S. HRG. 99-84

PRODUCT LIABILITY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 100

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

MARCH 21, 1985

Printed for the ure of the
Committee on Commerce, Science, and Transportation

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PRODUCT LIABILITY ACT

THURSDAY, MARCH 21, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room SR-253, Russell Senate Office Building, Hon. Robert W. Kasten, Jr. (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: David Zorensky and Marilyn Richmond, staff counsels; and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order.

I am pleased to begin today's hearing on S. 100, the Product Liability Act, legislation that would establish uniform product liability law in the United States. Over the past few years, this committee has held 7 days of hearings on earlier versions of this legislation. We have heard testimony and received comments from consumer groups, labor organizations, experienced trial lawyers, legal scholars, and state officials, as well as from manufacturers and also product sellers.

This legislation has been drafted and redrafted to address legitimate concerns raised by these groups and to produce a fair and balanced bill that will bring uniformity and clarity to an area of the law that has been riddled with conflicts and uncertainty.

S. 100 is a culmination of these efforts. It is a bill that will establish rules of law that are fair to both the manufacturers and consumers. It will promote the manufacture of safe products by establishing clear standards of responsibility. It will reduce unnecessary cost, particularly legal costs, associated with the lack of uniformity in product liability law.

In addition, S. 100 will help to stabilize insurance premiums. The end result will be safer products at lower cost to consumers and greater opportunities for competition by manufacturers and product sellers both at home and abroad.

[The bill follows:]

99TH CONGRESS
1ST SESSION

S. 100

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 3, 1985

Mr. KASTEN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Product Liability Act".

DEFINITIONS

SEC. 2. As used in this Act—

(1) "claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the

claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian;

(2) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy this standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;

(3) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, commerce, or transportation described in clause (A);

(4) "exercise of reasonable prudence" includes conduct of an ordinary person or class of persons, in the same or similar circumstances, exercising the care, attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others;

(5) "express warranty" means any affirmation of fact, promise, or description relating to a product, but does not include a general opinion about, or general

praise of, a product or its quality; the term does not require that a manufacturer use the terms "warrant" or "guarantee", or that the manufacturer have the specific intention to make an express warranty;

(6) "harm" means (A) physical damage to property other than the product itself; (B) personal physical illness, injury, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical illness or injury; the term does not include commercial loss;

(7) "manufacturer" means (A) any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product (or component part of a product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller designs or formulates and produces, creates, makes, or constructs an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds itself out as a manufacturer to the user of the product;

(8) "person" means any individual, corporation, company, association, firm, partnership, society, joint

stock company, or any other entity (including any governmental entity);

(9) "practical technological feasibility" means the technical, medical, and scientific knowledge relating to the safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer;

(10) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(11) "product" means any object, substance, mixture or raw material in a gaseous, liquid or solid state which is capable of delivery itself, or as an assembled whole in a mixed or combined state or as a component part or ingredient, which is produced for introduction into trade or commerce, which has intrinsic economic value, and which is intended for sale or lease to persons for commercial or personal use; the term does not include human tissue, blood, or organs;

(12) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, blends, packages,

labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce; the term does not include—

(A) a seller of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

(13) "product user" means any person, including the claimant's employer, who owns, operates, or has control of a product;

(14) "reasonably anticipated conduct" means the conduct which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product; and

(15) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

PREEMPTION OF OTHER LAWS

SEC. 3. (a) No person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. A civil action for loss or damage caused to a product itself or for commercial loss is not a product liability action, and shall be governed by applicable commercial or contract law.

(b)(1) This Act supersedes any State law regarding recovery for any loss or damage caused by a product to the extent that this Act establishes a rule of law applicable to any civil action brought against a manufacturer or product seller for loss or damage caused by a product, including any action which before the effective date of this Act would have been based on (A) strict or absolute liability in tort; (B) negligence or gross negligence; (C) breach of express or implied warranty; (D) failure to discharge a duty to warn or instruct; or (E) any other theory that is the basis for an award for damages for loss or damage caused by a product. Any issue arising in such an action that is not governed by any such

rule of law shall be governed by applicable State law. This Act shall not be construed to waive or affect any defense of sovereign immunity asserted by any State under any provision of law.

(2) Nothing in this Act shall be construed to supersede any Federal law, except the Federal Employees Compensation Act.

(3) Nothing in this Act shall be construed to waive or affect any defense of sovereign immunity asserted by the United States.

(4) Nothing in this Act shall be construed to affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. 1602 et seq.).

(c)(1) Nothing in this Act shall be construed to supersede—

(A) any environmental protection law that authorizes a State or a person to institute an action for civil damages, civil penalties, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution, caused by any product defined by State or Federal law as a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollutant;

(B) a right arising under the common law of a State to bring an action to abate a nuisance or otherwise protect against contamination or pollution of the environment, or the threat of such contamination or pollution, caused by any product; or

(C) any law relating to a civil action for loss or damage, cleanup costs, civil penalties or injunctive relief, if the loss or damage for which a remedy is sought was caused by the release into the environment, or the threat of release into the environment, of a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollutant.

(2) As used in this subsection—

(A) "contaminant or pollutant" includes (i) anything defined or designated as a contaminant or pollutant under any Federal or State law, and (ii) any element, substance, compound, mixture, or organism which, after release into the environment and upon exposure, ingestion, inhalation, impact, attachment, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, injury, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including

malfunctions in reproduction), or physical deformations, in such organisms or their offspring;

(B) "environment" has the meaning given to such term in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(8));

(C) "hazardous substance" has the meaning given to such term in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(14));

(D) "hazardous waste" has the meaning given to such term in section 101(29) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(29));

(E) "law" means any law or authority, whether statutory or common; and

(F) "release" has the meaning given to such term in section 101(22) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(22), and, in addition, the term includes any depositing or placing into the environment.

(d) Nothing in this Act is intended to affect in any way application of any rule of law regarding whether a claimant must identify the manufacturer of the product that caused the claimant's harm.

(e) The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code.

RESPONSIBILITY OF MANUFACTURERS

SEC. 4. In any product liability action, a manufacturer is liable to a claimant if—

(1) the claimant establishes by a preponderance of the evidence that—

(A) the product was unreasonably dangerous in construction or manufacture, as defined in section 5(a);

(B) the product was unreasonably dangerous in design or formulation, as defined in section 5(b);

(C) the product was unreasonably dangerous because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product, as defined in section 6; or

(D) the product was unreasonably dangerous because the product did not conform to an express warranty made by the manufacturer with respect to the product, as defined in section 7; and

(2) the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of

the product was a proximate cause of the harm complained of by the claimant.

PRODUCT CONSTRUCTION AND DESIGN

SEC. 5. (a) A product is unreasonably dangerous in construction or manufacture if, when the product left the control of the manufacturer, it deviated in a material way—

(1) from the design specifications, formula, or performance standards of the manufacturer; or

(2) from otherwise identical units manufactured to the same manufacturing specification or formula.

(b)(1) A product is unreasonably dangerous in design or formulation if, at the relevant point in time—

(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

(B) a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used.

(2) A product is not unreasonably dangerous in design or formulation if the manufacturer proves by a preponderance of the evidence that, at the relevant point in time—

(A) a means to eliminate the danger that caused the harm was not within practical technological feasibility, and the benefits and usefulness of the product to

the public outweighed the likelihood and probable seriousness of the harm;

(B) the harm was caused by an unavoidably dangerous product; or

(C) the harm was caused by an unsafe aspect of a product which was an inherent characteristic of the product and which would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community.

(3) As used in paragraph (2)(B), "an unavoidably dangerous product" means a product that, at the relevant point in time—

(A) is useful and desirable to the public;

(B) has a known but reasonable risk which, in light of the state of scientific and technical knowledge at that time, can not be made safe without impairing the effectiveness of the product's intended and ordinary use; and

(C) would have been made by a reasonable manufacturer using that particular design or formulation.

(4) As used in this subsection, "relevant point in time" means the earlier of the time of manufacture of a product or certification of an aircraft or its parts or accessories by the Federal Aviation Administration.

PRODUCT WARNINGS OR INSTRUCTIONS

SEC. 6. (a) A product is unreasonably dangerous because of the failure of the manufacturer to provide warnings or instructions about a danger connected with the product or about the proper use of the product if—

(1) adequate warnings or instructions were not provided, under subsection (b); or

(2) adequate post-manufacture warnings or instructions were not provided, under subsection (c).

(b) A product is unreasonably dangerous for lack of adequate warnings or instructions if, at the time the product left the control of the manufacturer—

(1) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm;

(2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm; and

(3) those warnings or instructions, if provided, would have led a product user in the course of reasonably anticipated conduct either to decline to use the

product or to use it in a manner so as to avoid harm of the type alleged by the claimant.

(c)(1) A product is unreasonably dangerous for lack of post-manufacture warnings or instructions if, after the product left the control of the manufacturer—

(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

(B) adequate post-manufacture warnings or instructions would have been provided by a reasonably prudent person in the same or similar circumstances, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm.

(2) A product is not unreasonably dangerous under this subsection if the manufacturer made reasonable efforts to provide adequate post-manufacture warnings or instructions to a product user or to another person, in accordance with subsection (d).

(d) Where warnings or instructions are required under subsection (b) or (c), such warnings and instructions shall be given to the product user, unless—

(1) in light of the practical and economic difficulties of giving the warnings or instructions directly to

the product user, the likelihood that the product would cause harm of the type alleged by the claimant, and the probable seriousness of that harm, a reasonably prudent person would have given such warnings or instructions to a third person, including an employer, who could be expected to take action to avoid the product user's harm or to assure that the risk of harm is explained to the product user; or

(2) the product is one which may be legally used only by or under the supervision of a using or supervising expert, in which case the manufacturer shall act with reasonable prudence to warn or instruct the expert.

(e) A product is not unreasonably dangerous for lack of warnings regarding—

(1) dangers that are obvious;

(2) the consequences of product misuse, as defined in section 9(c); or

(3) the consequences of product alterations or modifications, as defined in section 9(d).

As used in paragraph (1) of this subsection, "dangers that are obvious" are those dangers, including the magnitude of the danger, of which a product user in the course of reasonably anticipated conduct or a person identified in subsection (d), if applicable, would have been aware without a warning and

dangers, including the magnitude of the danger, which were a matter of common knowledge to persons in the same or similar position as the claimant.

PRODUCT EXPRESS WARRANTY

SEC. 7. (a) A product is unreasonably dangerous because it did not conform to an express warranty made by the manufacturer if—

(1) the product failed to conform to such warranty; and

(2) the failure of the product to conform to such warranty caused the claimant's harm.

(b) A product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.

RESPONSIBILITY OF PRODUCT SELLERS

SEC. 8. (a) In any product liability action, a product seller other than a manufacturer is liable to a claimant, if the claimant establishes by a preponderance of the evidence that—

(1)(A) the individual product unit which allegedly caused the harm complained of was sold by the defendant;

(B) the product seller failed to exercise reasonable prudence with respect to the product; and

(C) such failure to exercise reasonable prudence was a proximate cause of the claimant's harm; or

(2)(A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product;

(B) the product failed to conform to such warranty; and

(C) the failure of the product to conform to such warranty caused the claimant's harm.

(b)(1) In determining whether a product seller is subject to liability under subsection (a)(1), the trier of fact may consider the effect of the conduct of the seller with respect to the construction, inspection, or condition of the product, and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

(2) A product seller shall not be liable under this Act where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly rendered it unreasonably dangerous.

(c) A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

DETERMINATION OF RESPONSIBILITY IN A PRODUCT LIABILITY ACTION

SEC. 9. (a) All claims under this Act shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant's conduct shall not bar recovery in a product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant.

(b)(1) In any product liability action, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) indicating—

(A) the total amount of damages to each claimant for that claimant's harm; and

(B) the percentage of total responsibility for each claimant's harm attributable to each claimant, each defendant, each third-party defendant, and to any other cause or person who is not a party to the action (other

than the claimant's employer or coemployee, where the provisions of section 10 apply).

(2) In making the determinations specified in paragraph (1)(B), evidence of conduct defined in subsections (c), (d), (e), and (f) shall be considered. For purposes of this subsection, the court may determine that two or more persons are to be treated as a single party.

(3) The percentage attributable under paragraph (1)(B) to each defendant or each third-party defendant shall be determined by—

(A) subtracting the percentage of responsibility attributable to the claimant and to any other cause or person who is not a party to the action (other than the claimant's employer or coemployee, where the provisions of section 10 apply) from 100 percent; and

(B) allocating the percentage which is the result of the subtraction under subparagraph (A) among the defendants and third-party defendants according to their individual responsibility for the claimant's harm.

(c) Evidence that misuse of a product by any person other than the claimant's employer or coemployee (where the provisions of section 10 apply) has caused all or a portion of the claimant's harm shall be considered in determining the percentage of total responsibility for the claimant's harm allocable under subsection (b). Misuse shall be considered to

occur when a product is used for a purpose or in a manner which is not consistent with the reasonably anticipated conduct of users, which may include use for a purpose or in a manner which is not consistent with adequate warnings or instructions available to the user or failure of a person who would reasonably be expected to train another person or otherwise provide for the safe use of the product and who does not train or provide for the safe use of the product.

(d)(1) Evidence that an alteration or modification of the product by any person other than the claimant's employer or coemployee (where the provisions of section 10 apply) has caused all or a portion of the claimant's harm shall be considered in determining the percentage of total responsibility for the claimant's harm allocable under subsection (b). Alteration or modification shall be considered to occur when a product is changed in a manner which is not consistent with the reasonably anticipated conduct of users, which may include a change in the product design or formulation, or a change in or removal of warnings, instructions, or safety devices that accompanied the product.

(2) Alteration or modification shall not be considered to occur if—

(A) ordinary wear and tear of a product has occurred;

(B) the alteration or modification was in accordance with instructions or specifications of the manufacturer or product seller; or

(C) the alteration or modification was made with the express consent of the manufacturer or product seller.

(e) Evidence that the conduct of the claimant involving negligence, contributory negligence, or assumption of risk has caused all or a portion of the claimant's harm shall be considered in determining the percentage of total responsibility for the claimant's harm allocable under subsection (b). Conduct of the claimant involving negligence, contributory negligence, or assumption of risk shall be considered to occur—

(1) when the claimant, while using the product, was injured by a defective condition of which he was not aware and which would have been apparent, without inspection, to a reasonably prudent person; or

(2) when the claimant knew about the product's defective condition, understood that there was a risk of harm and the potential severity of that harm, and voluntarily used the product or voluntarily assumed the risk of harm from the product.

(f) Evidence of product misuse, alteration, or modification, as defined in subsections (c) and (d), by the claimant's employer or coemployee (where the provisions of section 10

apply) or other acts or omissions by the claimant's employer or coemployee shall be considered on the issue of whether the employer's or coemployee's misuse, alteration, modification, or other act or omission was a superseding cause of the claimant's harm.

(g) The court shall—

(1) unless section 10(a) requires a different result, enter judgment against each defendant or third-party defendant determined to be liable in accordance with its individual percentage of responsibility, as determined under subsection (b), or, where a defendant or third-party defendant is jointly and severally liable with another person, enter judgment against the defendant or third-party defendant on the basis of joint and several liability; and

(2) state in the judgment each party's percentage of responsibility for the claimant's harm.

Joint and several liability and contribution among joint tortfeasors shall be determined in accordance with applicable State law, except that the basis for contribution shall be each joint tortfeasor's percentage of responsibility for the claimant's harm.

(h) Upon motion made by a joint tortfeasor not later than 1 year after judgment is entered, the court shall determine whether all or part of the amount for which another

joint tortfeasor is responsible is uncollectible from contribution from that joint tortfeasor, and shall reallocate any uncollectible amount among the other joint tortfeasors, according to their comparative percentages of responsibility. The joint tortfeasor whose responsibility is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant.

EFFECT OF WORKERS' COMPENSATION BENEFITS

SEC. 10. (a) In any product liability action in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, the judgment entered against each defendant and third-party defendant found liable shall be determined by applying the defendant's percentage of responsibility, as determined under section 9(b), to the amount remaining after the claimant's total damages, as determined under section 9(b)(1)(A), are reduced by the sum of the amount paid as workers' compensation benefits for that harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for the harm. Where a defendant or third-party defendant is jointly and severally liable with another person, the judgment against the defendant or third-party defendant shall be entered on the basis of joint and several liability, and the court shall state in the judgment each party's percentage of responsibility for the claimant's harm. The determination

of workers' compensation benefits by the trier of fact in a product liability action shall have no binding effect on and shall not be used as evidence in any other proceeding.

(b) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller if the harm is one for which a product liability action may be brought under this Act.

(c) In any product liability action in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third-party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person who was injured.

(d) Nothing in this Act shall be construed to affect any State or Federal workers' compensation law provision which prohibits a person who is or would have been entitled to receive compensation under any such law, or any other person whose claim is or would have been derivative from such a claim, from recovering in any action other than a workers'

compensation claim against a present or former employer or workers' compensation insurer of the employer or any coemployee for harm caused by a product. Such other actions shall be prohibited, except that nothing in this Act shall be construed to affect any State or Federal workers' compensation law which permits recovery based on a claim of an intentional tort by the employer or coemployee where the claimant's harm was caused by such an intentional tort.

(e) As used in this section, "employer" does not include a State, where the State is acting in its capacity as an employer.

(f) Without regard to when the harm giving rise to the claim occurred, the provisions of this section do not apply to any person subject to or covered by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.), as amended.

TIME LIMITATION ON LIABILITY

SEC. 11. (a)(1) If any product is a capital good, no claim alleging unsafe design or formulation as provided in section 5(b), or failure to give adequate warnings or instructions as provided in section 6(a), may be brought for harm caused by such a product more than 25 years from the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

(2) As used in this subsection, "capital good" means any product, other than a motor vehicle, or a vessel, aircraft, or railroad used primarily to transport passengers, or any component of any such product, if it is also of a character subject to allowance for depreciation under the Internal Revenue Code of 1954, as amended, and was—

(A) used in a trade or business;

(B) held for the production of income; or

(C) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes.

(b) Subsection (a) is not applicable if—

(1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a cause of the claimant's harm;

(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product; or

(3) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

(c) Nothing in subsection (a) shall affect the right of any person who is subject to liability for harm under this Act to

seek and obtain contribution or indemnity from any other person who is responsible for that harm.

PUNITIVE DAMAGES

SEC. 12. (a)(1) Punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product. Except as provided in subsection (e), punitive damages may not be awarded in the absence of a compensatory award.

(2) As used in this subsection, "reckless disregard" means conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product. A negligent choice among alternative product designs or warnings, when made in the ordinary course of business, does not by itself constitute "reckless disregard".

(b) The trier of fact, in determining under subsection (a) whether punitive damages should be awarded, shall consider—

(1) the manufacturer's or product seller's awareness of the likelihood that serious harm would arise from the sale or manufacture of a product;

(2) the conduct of the manufacturer or product seller upon discovery that the product caused harm or was related to harm caused to users or others, includ-

ing whether upon confirmation of the problem the manufacturer or product seller took appropriate steps to reduce the risk of harm;

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller; and

(4) whether the harm suffered by the claimant was partly the result of the claimant's own negligent conduct.

(c) If the trier of fact determines under subsection (a) that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court shall consider—

(1) all relevant evidence relating to the factors set forth in subsection (b);

(2) the profitability of the conduct to the manufacturer or product seller; and

(3) the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected.

(d) Notwithstanding the provisions of section 13, a manufacturer or product seller may introduce relevant evidence

of post-manufacturing improvements in defense of punitive damages.

(e) In any action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant is liable for any such damages regardless of whether a claim is asserted under this section, and the recovery of any such damages shall not bar a claim under this section.

SUBSEQUENT REMEDIAL MEASURES

SEC. 13. (a) Except as provided in subsection (b), evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible.

(b) This section does not require the exclusion of evidence of a subsequent measure in an action alleging a product was unreasonably dangerous in design or formulation, if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure.

STATUTE OF LIMITATIONS

SEC. 14. Any civil action brought under this Act shall be barred unless the complaint is filed within 2 years of the time the claimant discovered or, in the exercise of reasonable prudence, should have discovered the harm and its cause, except that any such action of a person under legal disability

may be commenced within 2 years after the disability ceases. If the commencement of such an action is stayed or enjoined, the running of the statute of limitations under this section shall be suspended for the period of the stay or injunction.

SEPARABILITY CLAUSE

SEC. 15. If any provision of this Act or the application of it to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

EFFECTIVE DATE

SEC. 16. (a) This Act shall be effective 60 days after the date of its enactment, and shall apply to all product liability actions commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date.

(b) If any provision of this Act would shorten the period during which a manufacturer would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring any such action within 1 year after the effective date of this Act.

PRODUCT LIABILITY REVIEW PANEL

SEC. 17. (a) The Judicial Conference of the United States shall establish a Product Liability Review Panel (hereinafter in this section referred to as the "Panel") to conduct the studies required by this section. The Panel shall consist of

three individuals selected on the basis of their expertise regarding civil actions and recovery for loss or damage caused by a product.

(b) The Panel shall conduct a study of the need for Federal legislation providing appropriate and predictable benefits, compensation or damages, through efficient and expeditious means, to any claimant who, through no fault of the claimant, is harmed by a product and who is unable to recover in any civil action based on liability in tort either because—

(1) the manufacturer of the product did not know and could not in the exercise of reasonable prudence have known at the relevant point in time (as defined in section 5(b)(4)) about the danger that caused the harm; or

(2) the product that caused the harm was unreasonably dangerous (as defined in this Act), but the manufacturer could not be identified.

The results of the study required by this section shall be submitted to the Congress within 18 months after the date of enactment of this Act.

(c) The Panel shall conduct a study to determine the feasibility or availability, or both, of providing compensation without regard to fault to claimants for any loss or damage caused by a product. The study shall include an assessment

of current legislative or other actions regarding that compensation undertaken by Federal and State governments. The results of the study shall be submitted to the Congress within 2 years after the date of enactment of this Act, and shall contain recommendations for future legislative or other actions to provide compensation without regard to fault to claimants for any loss or damage caused by a product.

(d)(1) The Panel shall conduct an ongoing review of the adequacy of existing common law and statutory remedies in providing recovery for any loss or damage caused by a product.

(2) As part of the review required by this subsection, the Panel shall evaluate—

(A) the nature, adequacy, and availability of remedies and compensation under present law in providing recovery for any loss or damage caused by a product;

(B) the nature and scope of substantive, procedural and evidentiary barriers to that recovery, including statutes of limitation and statutes of repose, and the role of those barriers in the legal system; and

(C) the scope of liability for loss or damage caused by a product under present law and the consequences, including insurability, of any changes in that liability.

(3) The Panel shall submit the results of the review required by this subsection at such times as it considers appro-

priate, but in no event less often than January 15 of each year in which occurs the first session of a Congress.

(e) A member of the Panel who is not an officer or employee of the Federal Government shall be entitled to receive compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule pursuant to section 5332 of title 5, United States Code, for each day (including traveltime) during which the member is engaged in the actual performance of the duties of the Panel.

(f) There are authorized to be appropriated for the purposes of this section such sums as may be necessary in fiscal year 1985. Such sums shall remain available until expended.

REVIEWABILITY

SEC. 18. It is the intent of the Congress that, in other than exceptional cases, the Supreme Court of the United States shall not review issues relating solely to the sufficiency of the evidence in cases arising under this Act which have been finally decided by the highest court of any State.

Senator KASTEN. Our first witness this morning will be the Honorable Larry Pressler, my colleague from the State of South Dakota.

Senator HOLLINGS. Mr. Chairman, would it be in order while he is going to the table——

Senator KASTEN. Excuse me. Senator Hollings, do you have an opening statement?

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Mr. Chairman, we are here today for the first hearing of this session on S. 100, a bill to replace State product liability law with Federal rules.

It has been suggested by some of S. 100's proponents that hearings are not needed on this bill in the 99th Congress—that past hearings have been enough. But I believe that hearings are of the utmost importance to the legislative process. I feel it is crucial that Senators have a means of reeducating themselves on the issue as we begin a new Congress. The bill contains some changes from its predecessor, S. 44 in the 98th Congress, and I might note that we have two new Senators on the committee who did not participate in past hearings.

As most of you are well aware, I opposed S. 44 last year. I issued strongly worded dissenting views in the committee report. And although the new version contains changes in the punitive damages section and the addition of language attempting to clarify that S. 100 wouldn't preempt environmental tort law, most of S. 100 is identical to S. 44. I remain a staunch opponent.

Today, we have many distinguished and learned witnesses on hand, and I look forward to having them address my specific concerns.

For example, I am very concerned about the preemptive aspects of S. 100. For the Federal Government to just do away with 200 years of common law development in favor of a set of ambiguous Federal rules is a very serious step indeed. Where is the clear and convincing evidence that our State litigation system of product liability has directly caused a crisis in interstate commerce? I would like to know how our witnesses would justify a Federal standard.

We will hear testimony about how product liability insurance rates are again on the rise. But insurance rates have risen in the past, only to fall again—without Congress codifying product liability law. What evidence is there to link the current increases to the State law system? And why have so few companies taken advantage of the risk Retention Act, which Congress passed in 1981 to address this problem? These are questions I would like today's witnesses to answer.

In past hearings, experts have testified that this bill will not provide uniformity, largely because this new set of complex rules will most certainly be interpreted differently by hundreds of judges in the 50 States. I will certainly be interested in hearing how S. 100 will achieve its primary goal of uniformity.

Mr. Chairman, as you can see, I have many questions and concerns about this bill. I look forward to today's testimony, and to the opportunity to question witnesses. S. 100 represents a very drastic

Federal course of action, so it is important that we develop a complete record. Thank you.

Senator Pressler is ready to testify. I would also like to file the statement of the Attorney General of the State of Rhode Island, representing the National Association of States Attorneys General who are opposed to S. 100, and also the statement of Congressman Heftel of Hawaii, who asked that his statement be included in the record.

Senator KASTEN. Without objection, so ordered.

Senator Ford.

Senator FORD. Mr. Chairman, I will announce now that under this piece of legislation, S. 100, since my family is involved in an insurance agency, I will vote present when this comes to a vote here.

Senator KASTEN. Senator Danforth. I should say Mr. Chairman.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. I have a statement I would like to read. First of all, Mr. Chairman, let me congratulate you for your efforts. You really have been a leader in this area, and you continue to be. My hope is that we will report out a bill reasonably expeditiously, consider the various alternatives to your proposal that have or will be put forth by Senator Gorton, Senator Dodd, and anyone else.

This morning the Consumer Subcommittee hears testimony on S. 100, the Product Liability Act. I wish to commend Senator Kasten for his work on this product liability reform legislation. He has worked long and hard on this measure over the past few years.

I agree with Senator Kasten that there is a great need to resolve the uncertainty in product liability law and to simplify the process by which victims are compensated for injuries. The present patchwork of inconsistent, often contradictory State laws not only makes it difficult for manufacturers to know what standards they will be held to in manufacturing a product: It delays justice to those victims truly deserving of compensation, and it encourages frivolous suits by lawyers who go about soliciting half-hearted plaintiffs in hope of recovering windfall contingent fees.

The status quo is truly a disgrace.

There is no question that product liability reform is necessary. The present confusion in the tort system adversely affects productivity, interstate commerce, and international trade. It leads to excessive litigation and high insurance costs. It is a tremendous burden on manufacturers.

But uniformity and predictability should be applied across the board so that when an innocent consumer is injured, he knows that he will recover and recover quickly. In my view, then, we should go forward with the legislation as expeditiously as possible, but we should address also the question of some kind of no-fault or strict liability compensation system alternative to the tort litigation system, that would limit the size of recovery in product liability cases to truly compensatory amounts—perhaps, along with lines of what has been accomplished in the employment context through the enactment of workmen's compensation.

I would like to see this issue addressed now as part of product liability reform. Last year, during the mark up of S. 44, the predecessor to the bill we are discussing today, I offered an amendment that touched on this question. This amendment, which was adopted and which is now part of S. 100, would establish a special review panel to study the tort system and to suggest ways to compensate innocent persons who are injured by defective products but are unable to prove negligence or to identify the manufacturer.

This amendment reflected my concern with the compensation question. Unfortunately, it was the only proposal I could make in the circumstances at that time, and my actions should not be construed to mean that I do not believe we should consider the question of alternative compensation systems at this time. There are those who argue that we should reform the tort litigation system before we address the compensation question. I do not share that view.

It is my understanding that several Members of the Senate, including Senator Gorton and Senator Dodd, have prepared compensation propsoals. I intend to study these measures, and it is my hope that they will be considered as part of the overall question of product liability reform.

Senator KASTEN. Thank you very much.

Senator Gorton.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Thank you, Mr. Chairman. As you know, I am not a member of this subcommittee, and I appreciate the ability to be with you here for a few minutes today. I suppose I owe you an apology, Mr. Chairman. I am the cause of at least some of your problems with respect to this bill, both in the last Congress and in this one.

I have to confess, however, that I am not satisfied with S. 100 in its present form, partly on substantive grounds and partly because I don't believe that it is in a form in which it has any significant chance of becoming law passing through the congressional process.

I have been working on an alternative version which does incorporate the subject matter, the compensation provisions to which the chairman of the full committee referred in his remarks. I haven't produced something yet. A large number of people and groups which are represented here today have received rough drafts of the proposal for their comments. Some of those comments come back. Many have been constructive, and some have suggested that we shouldn't get involved in making changes to S. 100 at this point.

I don't wish to slow down the process for a product liability bill or to do anything to delay a markup of it when the chairman and the ranking minority member determine such a markup should take place. But I do intend to continue to attempt to come up with an approach which meets what I consider to be the very broad and very legitimate concerns of the alliance which is prepared to pass this bill with the current state of product liability legislation without, at the same time, removing the right of compensation to victims of accidents from the use of products.

Whether that will be in a form in which it can be introduced in the course of the next 3 or 4 weeks, I am not certain, but I will continue to attempt to reach that goal.

Senator HOLLINGS. Mr. Chairman, on that point, Senator Gorton, I think Senator Dodd put in a bill yesterday, I was told.

Senator GORTON. Senator Dodd did.

Senator HOLLINGS. Could we get your bill in and have a hearing on that so we could move along on it?

Senator GORTON. Well, as I say my desire was to talk to as many people on both sides of this issue and as many academics as I could before I introduced the bill, rather than to push out something which had many obvious obvious defects.

What I can tell you, Senator Hollings, is that we are working on it diligently and will have one as soon as we can, but I want to have one which I can appropriately and intellectually defend when I introduce it.

Senator KASTEN. I would like to just say to the Senator from Washington, that, first of all, you are not part of my problems; hopefully, you are part of the solution. And you have been helpful in the past, and we worked together in the last Congress. Senator Dodd did introduce this bill yesterday. It was introduced as an amendment to S. 100.

Your legislation, as presently drafted, is not as an amendment to S. 100, but I think that working with Senator Dodd and Senator Gorton and others, I think that there is an opportunity for us to move forward. But I very much appreciate your statement, and also appreciate your contribution to the efforts that we are making.

Senator GORTON. Thank you.

Senator KASTEN. The Senator from South Dakota, Larry Pressler.

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM SOUTH DAKOTA; ACCOMPANIED BY JAMES WINKER, VICE PRESIDENT, RAVEN INDUSTRIES

Senator PRESSLER. Thank you very much, Mr. Chairman. I shall summarize parts of my statement, because I want to yield to one of my constituents for an example. And also, I realize that some distinguished members of the House, Congressman Broyhill who is here, and has done a lot of work in this area, and Congressman Heftel, are waiting.

But basically, I think we have to do something about the situation to protect consumers in this country regarding these lawsuits and liabilities. And that is true not only in the commercial area, but I think it is also true in the medical area.

The fact of the matter is that product liability insurance is getting so high and medical liability is so high, although that is not part of this bill, but there is sort of an uproar out there over the difficulty of being a manufacturer or being a doctor, or carrying on activities, and most of these huge judgments, or allegedly huge judgments, don't get to the injured person. They, in part, go to the lawyers. And in the end, consumers have to pay for them if they are awarded.

And it is a situation that we have got to have the courage to address. And so this morning I wish to make a statement in strong support of Senate 100 and explain my position on and interest in this legislation.

This area has been of interest to me since many years ago, when I wrote a paper on it for Professor Fried at the Harvard Law School. It seemed a backwater area of the law, practiced by a relatively small bar. It certainly posed no national problems as it does today.

It may be of a surprise to some people that product liability is a problem in a State with a relatively small population such as South Dakota. Nevertheless, I can assure you that it is.

I have with me today Mr. James Winker, vice president of Raven Industries. Raven Industries is one of our leading manufacturers in South Dakota and employs approximately 1,000 people in our State. Raven is most famous for its high-quality, hot air balloons. You may recall that it was Raven who manufactured the balloon durable enough to successfully complete the first and only trans-Pacific flight, and although it is most famous as the world's largest manufacturer of hot air balloons, Raven Industries also has product lines in high technology computerized process controls for foodstuffs, agricultural feeds, and chemical applications.

It manufactures everything from agricultural and chemical containers to sportswear and experimental Army uniforms, and is well known for its high standards in quality control.

Today, the very existence of a number of Raven's product lines, most notably its famous hot air balloons, is threatened by the enormity of the product liability problem. Lawyer fees, entangling legislation, and some unfair rules in States other than South Dakota, could force Raven Industries out of business.

The cost of Mr. Winker's product liability insurance over the past year has risen from $250,000 to $750,000. Meanwhile, the amount of coverage he has obtained has been substantially reduced from $30 million to $10 million. The premium increases in coverage reductions are a reflection of the actual exposures in costs that can arrive in this ever-worsening area of the law.

These problems can have only one of two results. First, they can drive the company out of business or force it to eliminate a product line; or second, the product can stay in business by increasing its costs. Either way, the consumer loses.

That is something I want to particularly emphasize. It is because of these facts that I find it hard to understand why the so-called consumer advocate groups are urging their members to oppose this bill. Indeed, I was contacted earlier this week by one such group and was told that if I continued to support this legislation, they would flood my State with press releases and statements in opposition to my position.

If that is the case, I suggest that they get the presses rolling because I do support this legislation and I am proud to be included as a cosponsor. I only hope that they at least address the issues I raise today. We can no longer afford to bankrupt small businesses and penalize the overwhelming majority of consumers to support unwarranted and unnecessarily high awards which are largely consumed by legal expenses, rather than going to the plaintiff.

This legislation does not limit claimant actions or award amounts where they are justified. It simply restores some sanity to our legal system. S. 100 is not anticonsumer or directed against injured persons. In almost every respect, it is good or more favorable towards injured parties than the law of my State.

For example, my State may bar a claim when an injured party is more at fault than a defendant. S. 100 does not do that. In my State, a person can unwittingly be trapped by a statute of limitations. S. 100 does not do that, but preserves claims for injured people until they know or have reason to know of their harm and its cause.

My State has a relatively unforumlated obligation on manufacturers regarding their responsiblity for products after they have been placed in the marketplace. S. 100 has a clear and pointed, continuing duty to warnings placed on manufacturers so as to keep them alert about new developments relating to product risks, and also causing them to take action to inform product users about those risks, if and when they occur.

On the whole, South Dakota product liability law is fair and balanced. However, a problem the current system presents to the overwhelming majority of States is that citizens of most States, in effect, pay a tax because of very, very extreme decisions in a relatively few States.

Let me explain what I mean by that. As I have mentioned, product liability insurance costs are added to the price of products. They are not, and as practical matter, cannot be added on as a different basis in each State. What happens is that citizens in my State pay for the cost or product liability insurance that is prompted by very, very extreme decisions in many States.

The citizens of South Dakota and the overwhelming majority of States derive no benefit from these rare and extreme cases. We have never heard example after example of cases of this kind where people recover who have misused or abused products in totally unforeseeable ways.

The overwhelming majority of goods that are manufactured in South Dakota are shipped out of the State. Thus, South Dakota companies such as Raven are constantly confronted with a myriad of different rules that often conflict. It is not the law of our State that bothers Raven or imposes these costs. It is the myriad of conflicting State laws, coupled with such practices and legal maneuvers as forum shopping that create the problem.

I believe that the incentives for safety set forth in S. 100 which are, time and again, placed on the party who can do something about preventing an accident will help promote safety nationwide. I also believe that it will serve to reduce the unnecessary and burgeoning legal costs paid for by persons like Mr. Winker.

In sum, S. 100 will improve dramatically the product liability situations for small businesses in my State. It will not impede or reduce the right of persons in my State to recover for harms caused by products. It will provide clear incentives for safety and lead to the manufacture of safer products and take a major step towards reducing legal costs that have reached the level of absurdity.

With that, Mr. Chairman, I will close my formal statement and ask Mr. Winker to explain, just briefly, a few details about Raven Industries, and then we would be glad to answer any questions.

Mr. Winker.

Senator KASTEN. Senator, thank you very much, and we welcome Mr. James Winker.

Mr. WINKER. Thank you. I appreciate the opportunity to address this group. I think in the product liability area, you are probably more familiar with what is happening in the larger industries. I would like to tell a little bit about what is happening in a small industry.

Just because it is a small industry does not mean it is insignificant. We are not isolated. This is happening in many other similar types of businesses. What we have experienced is happening many places in the country.

To restate just quickly, Raven Industries is a relatively small business. We have about 1,000 employees. Our volume is about $50 million a year. We are a diversified company having four different divisions and many product lines within those divisions. We are right now threatened with the extinction of one of those product lines, and that is the hot air sport balloon.

Raven is the largest manufacturer of hot air sport balloons. This is a business which, in our part of it, runs to about $2 to $3 million a year. This supports roughly 40 jobs within the company. Now that is a small industry, but the 40 jobs and the $3 million is not the limit of it, of course, because if you go back and consider our suppliers, our dealers, our distributors, the repair business, the whole unit of business that this covers is several hundred jobs and probably $7 to $10 million.

This is a relatively new industry. It was born just 25 years ago, as we know it today, and it only really became significant perhaps 10 to 15 years ago. Back then at that time, the lawyers had not found us yet, and we had been getting insurance—10 years ago we could obtain insurance adequate to protect ourselves for about $15,000 per year. Even at that time, this amounted to a little over 2 percent of the wholesale price of the product.

Now, I would like to emphasize here, when I am speaking of insurance costs, this is cost of only our aviation products liability. We have separate liability for all of the other products within the company. This is one product line only.

In the late 1970's, just a little over 5 years ago, the rate had gone up to $100,000 a year, and at this point, our business had increased also; it was 4 percent of the cost of the product. Now, just this year the cost is $750,000, and this is an astounding 31 percent of the price of the product.

Now, we cannot survive that sort of a cost. Just to review, in those 10 years, our costs have gone up a total of 50 times. That's 5,000 percent. We have tried to increase the price of the product to cover part of this. We have had a rather large price increase just this year just to cover this last increase. It will in no way begin to cover all of it. We will not be able to yield any profit on this product at all this year, and at the increase in price that we have made, we are not even sure we will be able to sell the product through the rest of the year.

Now, it may be too late. Maybe we cannot salvage this product. We might already have to consider it down the drain. But we are still very concerned about this legislation and the effect of product liability because we have other products which will follow along. If the same mentality continues, we will find that one product after another will fall under the axe of these immense awards.

Raven has not had a lot of lawsuits in the hot air balloon industry. We are thankful for that. We think it results from our concern for safety and our high regard for quality in the product. According to the FAA accident records, we have a favorable safety record. We do not have an excess of accidents, so you would wonder why are we saddled with such severe insurance premiums?

Well, I think there are two reasons. We are lumped in, in general, with the aviation industry as a whole. And, as you know, there have been some very, very large awards in airplane accidents. We are sort of lumped in—guilt by association.

Now, about 5 years ago, the big-time lawyers did find this hot air balloon industry and we have had two cases which have gone to litigation, and there have been very large awards. Incidentally, in both cases, there was no claim that the balloon was designed or built improperly.

So those things affect the cost of our insurance and it affects it to the point where we find it intolerable. There are other balloon accident cases pending, fortunately not ours, but if there are awards in those, the settlement won't rest only on the manufacturer of the balloon; it comes to the industry, and it will affect us just as strongly.

Now, if there is no relief in the product liability situation, as I say, I don't think we can survive in this business. Who will survive? Well, I don't know if our industry is typical of others or not, but it will not be "survival of the fittest." We are the largest manufacturer in this industry. There are two or three other medium-sized businesses and many smalls that you might consider garage shop operators. The garage shop operators have few assets and little, if anything, to protect, and so therefore they carry little or no insurance.

If we are forced out of the business because of our high insurance costs, the small companies will still be there. They don't have much to protect. If they get hit by a lawsuit they can go out of business one day and come back under a new name another day, and we will be left with the companies who have little or no engineering support—I would not say in all cases less quality, but it tends that way—and the least responsible people will remain in this business, and the consumer will suffer then because the product quality will have gone down.

Thank you. If there are any questions, I would be happy to try and answer them.

Senator KASTEN. Mr. Winker, we thank you and in particular, we thank Senator Pressler for being with us this morning.

Senator Hollings.

Senator HOLLINGS. Senator Pressler, the record will show that the majority of the fees were made by the defendants' lawyers rather than the plaintiffs'. The committee report last year claims that for every 42 cents in defense cost, there are 33 cents in plain-

tiff's costs. Your statement was that plaintiffs' lawyers were receiving all the fees.

But let us assume everything you stated, like we do in an old time tomorrow, assume everything you have alleged to be true. What is your experience with respect to the Federal jurisdiction in comparison to the State jurisdiction?

I know myself, I practiced law for 20 years and if I could find diversity of jurisdiction so I could get into the Federal court, I doubled my chance of a larger verdict. I just don't understand. I think in the small communities of South Dakota and South Carolina, you have got the local people with common sense and their own community values, and they are far more conservative.

It is when you get into the Federal court, if you are really trying to save money and high costs, that judges or juries will just write you a good verdict right now. I would like to get out of this thing sometimes in the Senate and get on back to making a good living again.

But assuming everything you say to be true, what has been your experience in trying cases in a Federal court in South Dakota as compared to the local jurisdiction?

Senator PRESSLER. Well, I think that is a little misleading. Under S. 100, as I understand it, the judge will frequently set the amount, not the jury. But the point is that there would be a more uniform set of rules in the various States. And let me back up a little bit to say that I don't see this as a contention just with all lawyers. I think the trial lawyers of America have made a basic mistake by making this such a big issue, because there are a lot of corporate lawyers, most of those trial lawyers that are really paying their rent from corporate fees.

But the point of the whole matter is, I think that is a little bit of a donnybrook here because if the rules are more universal, the whole picture will be clearer and S. 100 does address some of those problems.

Now, let me also say that I don't know offhand, and indeed I would correct the record in terms of plaintiffs' lawyers or defendants' lawyers, but the amount that goes to the lawyers, whether defendants' or plaintiffs', is a very high percentage in the final analysis, on whichever side.

And I don't know if you know exactly what that percentge is. I have heard differing amounts from one State to another, all the way from averages of 30 to 60 percent in terms of fees or costs or legal fees or however you may want to define them. But I think you will find that S. 100 addresses those problems.

Senator HOLLINGS. Let's put it in a different light with respect to the setting of the rules, the procedures, and the principles to be employed in any kind of product liability case. Let's look at the issue of having the national Congress or the legislature of South Dakota decide the rules—I found this a liberal crowd up here in Washington. They will spend you blind. They are spending everybody else's money that they can get their hands on right now. I can't get them to pay any bills.

And momentarily, it might look like you are getting some uniformity. I would be frightened to have the court law taken over by

the national Congress. They will have strict liability and all the other requirements in there before you get through.

It is at the Federal level in the jurisdiction that it becomes more liberal and generous with respect to awards. Hasn't that been your experience, coming from South Dakota up here to Washington?

Senator PRESSLER. Well, let me respond to that because you could come at that from another approach and say that the people of South Dakota have to pay for the high awards in New Jersey, for example, under the present system. The people in South Dakota might have quite a different standard, but presently the insurance that my friend pays at Raven Industries are the highest, a result of jury cases in New Jersey or New York or New York City.

Senator HOLLINGS. Do you think we will go towards New Jersey or go back to South Dakota as a national Congress? Hasn't the tendency been for us to adopt the California rule, the New Jersey rule, New York, or the more liberal rule up in the national Congress, rather than South Dakota?

Senator PRESSLER. Well, S. 100 does not do that. But let me just take it another step further. You talk about the liberal crowd. I am a great supporter of all the Hollings amendments on the budget and so forth, and if that is part of the liberal crowd, then I am part of it.

And indeed, I salute you because you are the leading spokesman for the trial lawyers of America in the Senate.

Senator HOLLINGS. I will have to get in touch with that crowd.

Senator PRESSLER. And I respect you, but I disagree very strongly on this issue, because I think that the consumers of this country are paying higher for all their products. You know, I was over in India in January, and I spoke at Nehru University, and they all said to me, you know, we have got to really get big damages on this gas case, and I said well, you know, if that happens, any company that operates here is going to have to be insured, and the consumers of India in the future are going to pay much higher costs for products.

I mean maybe they should be, but I just reminded them of that. And that is what we are overlooking. The consumers have to pay for this. There is nothing free.

Now, I am a great advocate of States rights and so forth, but in this case the rights of some States are being imposed—I mean the people of South Dakota have to pay the higher insurance rates for jury decisions in New Jersey and California, so you can argue it backwards. It depends on how you start. It is like tic, tac, toe; who moves first?

Senator HOLLINGS. Well, let me return this to the Chairman. We have Congressman Broyhill here who we want to hear from, and I will have some other questions. Thank you.

Senator KASTEN. Senator Pressler, thank you very much for your testimony. Mr. Winker, thank you very much for joining us this morning.

[The statement follows:]

STATEMENT OF RAVEN INDUSTRIES, INC.

The proliferation of high value awards in product liability suits has become increasingly serious. In any one week a review of the news is likely to show several

cases where plaintiffs have been awarded damages in the range of millions of dollars. This has become legendary in such large industries as machine tools, drugs, automobiles and chemicals. The devastating impact of these awards is lost on most people because they assume (mistakenly) that this is happening to large companies and they can afford it. It is not to be denied that some such awards are justified, but it is our thesis that the range of justifiable awards has been vastly exceeded. The cumulative effect has a drastic impact on all consumers and is not simply a penalty to industry.

My purpose in this statement is not to repeat evidence that may be more or less familiar, but to describe how the product liability crisis affects a relatively small company. One of our product lines right now is threatened with extinction, and if trends continue, others will be valnerable in future years. Whatever happens to Raven Industries is not going to have a great impact in the national economic scene, but ours is far from an isolated case. Hundreds of companies will be affected just as we are. The combined effect will have a pronounced adverse effect on businesses, workers, and the consumer.

Let me get down to specifics. Raven Industries is the world's largest manufacturer of hot air sport balloons. It is true, the world would survive if this product did not exist. But that is not the point. The product meets a need, as evidenced by the hundreds of new balloons purchased each year. Our share of this business amounts to between two million and three million dollars per year and our total company sales are approaching 50 million dollars. The balloon portion of the business provides jobs for forty people within the company, and for several hundred more if you look at the labor required to produce the components and to distribute and service the product.

How exactly are we affected? The sport of ballooning as it now exists is relatively new, with the roots going only back to the 60's. The sport reached a modest level of visability only a little more than a decade ago. At that time, before plantiffs' lawyers found this new target, a sufficient level of liability insurance cost on the order of $15,000 per year. This amounted to a little over two percent of the price of the product. Five years ago, that insurance cost $100,000, which still only amounted to four percent of the price of a balloon. Today we are simply unable to obtain the level of insurance we feel is required, and even that which we can get now costs $750,000. This constitutes 31 percent of the price of the product, and I don't believe this or any other product can survive long with that burden. Note that over a 10-year period our premiums have increased by a factor of 50. That's 5000 percent.

There may be a number of reasons why we find ourselves in this situation, but having a faulty product is not one of them. We compare favorably with other brands, having a lower accident rate (according to FAA records) than other manufacturers. The overall accident rate is not materially different from other sports of a similar nature.

The worst factor affecting our liability insurance rates is simply the fact that we are lumped into the category of aviation in general, and this whole group has been beset by exorbitant claims resulting from a few large airplane accidents. Thus, we have had higher rates imposed upon us just because of what might be called "guilt by association". This is not the only factor, however, The aviation rate has in itself skyrocketed, but our experience is worse. It has been reported that one of the major general aviation manufacturers (light planes and small business craft) has had premiums increased from one million to ten million dollars in a year's time. This is astounding, but even so, insurance cost as a percentage of aircraft cost is far lower than what we have been saddled with.

Another, apparently sizeable factor in our case is that there have been a few very visible balloon accidents which have resulted in large settlements either directly by compliant juries or by out-of-court settlements under the threat of liberal jury decisions.

Three cases with which I am closely familiar might be cited. In one, a balloon was known to have a structure which had deteriorated through abusive use and needed extensive maintenance. A maintenance ship had declared the balloon un-air worthy. Nevertheless, the pilot flew it, carrying a passenger, resulting in a crash which critically disabled the passenger.

In a second case a balloon which was completely airworthy was flown into powerlines by the pilot, operating the balloon in a negligent manner. An ensuing fire resulted in four fatalities. A jury determined that the balloon was not defective and that the primary cause of the accident was the pilot, and yet a large award was assessed against the manufacturer.

In a third case a balloon was known to be structurally impaired, which again was the result of inadequate maintenance. The pilot knowingly flew this balloon into an

area of high winds and heavy turbulence. Turbulence caused the weakened balloon to tear and collapse, resulting in two fatalities. In just these three cases total awards plus defense legal fees exceeded five million dollars. This is undoubtedly far more than all other balloon accident awards combined, but it signals a frightening trend.

One wonders what the alternatives are to cope with this situation. Some hold that if an accident can happen, then the victims should be rewarded from whatever source can be found, which usually means the manufacturer. The apparent belief is that in so rewarding the victims, no one is really hurt, since insurance covers the cost. Or alternatively, perhaps, this "punishment" will cause the manufacturer to improve the product, making it safer for future users.

To address the first point, obviously someone does get hurt. Big awards necessitate big insurance premiums. These costs must be passed on to future consumers, all of whom are penalized by inordinate awards. As the situation worsens, either the product will be priced out of the market or else it cannot be sold at a profit, which in either case means loss of business to the manufacturer and loss of jobs to employees. In the type of cases that we are talking about, where there is no logical basis for large awards against the manufacturer, we end up with one large act of generosity balanced off by a multitude of small penalties. But the small penalties are cumulative and they become noticeable and painful.

Regarding the pressure to improve designs, there is already effective motivation for that purposes. It is called competition. The pressure of large financial awards is actually counterproductive. First of all, the payment of the larger insurance premiums will reduce the resources available to do research and development. The second factor is less obvious but unquestionably real. Larger manufacturers will, by and large, have larger design staffs, do more extensive development and testing, and have a greater vested self interest in producing a high quality product that will not suffer operating problems.

The larger companies also have more assets to protect and must carry higher levels of insurance. As noted above, the end result of continued high awards and escalating insurance costs is likely to drive the larger company out of the business. On the other hand, the very small producers—which are common in our industry—have little or nothing to protect and frequently carry little or no insurance. In the face of a serious lawsuit they can close their doors and dodge the problem, resurfacing later under a different guise to build the same mediocre product. With these two contrasting philosophies of operation, the small company sharply undercut prices of the large one. Eventually, smaller companies having little inclination and fewer resources to do advanced development work will inherit the market.

The proposed legislation (Senate Bill S. 100) is a step toward the solution of some of these problems, but even it is not the whole answer, my hope is that the process of liberalizing and extending damage awards can be halted and reversed before it is too late for us. If we are not successful in saving this portion of our business, then we must still be concerned about other products which may be next on the list of attractive targets, such as chemical storage tanks, fertilizer application equipment, or computerized process controllers. There is no question in my mind that, lacking some form of mitigating action, consumers will be saddled by ever higher passed-through costs, competition will diminish, jobs will be lost, and everyone will pay for benefits to a few who have lawyers clever enough to extract large sums of money from the system.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS

Question. I understand there is a substantial amount of international competition in your industry. Could you tell us what, if any, effect U.S. product liability laws have on your ability to compete in the international forum?

Answer. We have competition from several foreign countries in our hot air balloon business. Right now they have a considerable benefit in competing against us because of the situation with the strong dollar. But even if that should change, they will have a decided advantage in regard to the cost of their product liability insurance. The product liability climate is altogether different in Europe and requirements for insurance coverage are far less than here. In this regard, they are much like the garage shop operators mentioned in my verbal testimony. The U.S. agents of these companies, because they are all small operators, also generally elect to

carry low levels of insurance coverage. The European competition will continue to have a strong influence in our markets.

Question. You have described the effect of product liability laws on your own company. Can you tell us how they effect your suppliers and the products they supply?

Answer. Suppliers of some of the major components and materials we use have also been hit by balloon-related lawsuits. Reaction has ranged from an uneasy tolerance of the situation to outright refusal to sell a product to us. Materials which have been or still are affected include fuel tanks, fuel control valves, balloon fabrics, and a fastener material (Velcro) which is used in a safety application to secure control panels in place.

To the best of our knowledge the materials we have chosen are the best for the purpose. If we are forced to change to alternate suppliers, it is possible that the safety of the system may be adversely affected. The ultimate result of such pressure on suppliers could be complete unavailability of some materials, making it impossible even to build our product. This, then, is a second route by which we could be forced out of business by the present system of handling product liability claims.

Question. You have mentioned some specific product liability lawsuits in your statement. Could you briefly describe one or two of them, and how they have affected your products' prices to the ultimate consumer?

Answer. In one instance an aged balloon was known to have weak fabric. The pilot and a passenger were preparing to launch the balloon in the vicinity of a mountain where there were strong winds and turbulence. The windy conditions were abundantly evident because other balloons (better maintained) were launching in the same area. While the balloon was being inflated, several spectators pointed out that the weak fabric actually had tears in it. Even knowing of the damage and of the weather conditions the pilot launched his balloon. Turbulence caused the balloon to tear in many places and it collapsed, resulting in two fatalities. This event took place in view of hundreds of witnesses who universally acclaimed that this balloon should not have been flown in this situation. This case would have been tried in California, but was settled out of court for "only" $350,000.

In another case, a balloon which was relatively new and in excellent condition was flown at low levels into a power line which was at a location where the pilot should have expected it. The power line caused a rupture in the fuel system, followed by a fire. The pilot was further negligent in not bringing the balloon to the ground after the contact, which could have been done is 15 or 20 seconds. Instead, the pilot let the balloon ascend and finally after a full minute, panicked and jumped, along with her three passengers. A jury determined that the balloon was not defective when delivered, and that the pilot was predominantly at fault in the accident. Nevertheless, they assessed damages in the amount of $1,800,000 against our insurance company.

It is impossible to trace how much of our insurance cost increases can be attributed to these two cases, and how much to the general increase within the aviation industry. It doesn't really matter, because it is exorbitant product liability mentality which is at fault in either case.

Question. Do you have any specific recommendations or suggestions on how the committee might improve this legislation?

Answer. We have some concern about the provision for comparative responsibility as it is written in the bill. The idea of comparative responsibility in itself is good and definitely should be a part of the wording. However, it is a common practice in jurisdictions where this provision now exists for juries to make sure that the deep pocket defendant is at least a few percentage points responsible. Thus, if other defendants with higher levels of responsibility have no resources (as is often the case in our industry) then the deep pocket ends up paying the entire award anyway. This negates the effect of comparative responsibility.

Senator KASTEN. Our next witness is The Honorable James Broyhill who is the U.S. Representative in the State of North Carolina.

Jim, let me say we are pleased and happy to have you here. Thank you very much for your patience. We look forward to your testimony.

Congressman Broyhill is the ranking Republican on the Commerce Committee in the House of Representatives. He has a distinguished career, and we are very, very pleased to have you appearing before us this morning and we look forward to your testimony.

STATEMENT OF HON. JAMES T. BROYHILL, U.S. REPRESENTATIVE FROM NORTH CAROLINA

Mr. BROYHILL. Thank you very much, Mr. Chairman and Senator Hollings, Senator Pressler. It is always a pleasure to come over here and appear before this subcommittee, which I have done several times, but I certainly hope that our next meeting with respect to this subject is going to be at the rose garden and a signing ceremony.

I have been involved in this issue for a number of years and it goes back a long way, Senator Hollings, but it seems to me that I recall when I first became interested in this, that your hair was much darker.

Senator HOLLINGS. I have been trying to get in that rose garden for a number of years.

Maybe this is the way. I tried the wrong way.

Mr. BROYHILL. We will get this bill through and get it signed, we will get you to that rose garden.

The former Congressman from North Carolina, Congressman Richardson Pryor, and I worked on this a number of years ago. As you recall, Rich had a very distinguished career as a Federal judge and as a trial lawyer.

Senator HOLLINGS. Congressman, right at that point. He wanted to establish a Federal cause of action. Why don't they? Let's say, under the interstate commerce clause, we find this an undue burden and, as a result of that congressional finding, we institute a Federal cause of action. Now, Rich wanted to do that.

Why do you superimpose the Federal principles and rules on the State system? You just eliminate the State tort law with respect to Federal product liability, and then just superimpose a bunch of Federal rules and principles without your Federal cause of action.

I understand your logic and your finding.

Mr. BROYHILL. Well, what we are addressing here is, of course, S. 100 and this bill is not different from H.R. 7921 which we introduced a number of years ago. But what we are doing here is addressing a problem that I have seen growing worse, Senator Hollings. We are not changing jurisdictions. I am not an attorney, and I cannot argue fine points of law with you. But as I interpret what you are doing here, you are not changing, necessarily, the jurisdictions where these cases will come up. The cases will still come up in State courts, and of course today, under the present situation, you can get your cases brought up in dual—or more than one jurisdiction.

My concern is, as the gentleman from South Dakota, Senator Pressler, introduced here, is that everyone is losing under the present system. And I can cite you other cases in North Carolina, similar experiences as this gentleman, where they are having to go out of business. And what is this doing? This is affecting people who are gainfully employed, and this is one of the concerns that I have, is that in this day and time where we are competing not with the competitor in the next town or the next State, our competition is overseas.

And as you know, you and I joined just the other day in introducing a bill to try to address some of these problems of competition

from abroad. It seems to me that we ought to be doing what we can to try to reduce the burden, to reduce the cost of manufacturing in order to encourage employment in this country.

Instead of uniformity, we have a very confusing, conflicting jumble of constantly changing product liability laws, and of course that does result in increased legal costs. I don't think anyone is saying that we are going to do away with legal costs, but I think we should do everything we can to try to reduce those costs.

Now, one of the things that concerns me, and I think Senator Pressler in some way addressed this, the charge is made that, in some way, this bill is unfair to plaintiffs. Well, Mr. Chairman, you know this bill better than anyone, but you know that is just not true. And I think Senator Pressler pointed this out very ably, where some jurisdictions would bar suits in certain cases, and whereas this bill would prevent these unfair results, we don't want that to occur.

Under current law, for example, it is the manufacturer's duty or responsibility to warn consumers after a product has been manufactured with respect to some defect. The law with respect to that manufacturer's responsibility is vague, it is ambiguous. S. 100 provides a clear and certainly a national duty to warn after a product has been produced and he finds out something is wrong with it. This bill would help consumers, would help the so-called plaintiffs in that respect.

And I could go on and on. The Senator did a good job in explaining some of those.

But I don't think there is any doubt that this uniform bill would reduce legal costs, and what we would be doing is looking to one document to determine the rights and responsibilities in the law.

I think we could ask, perhaps in partial answer to your question, Senator, is what about our experience under the Uniform Commercial Code? What about our experience under the Federal Rules of Evidence? In other words, has our experience under those two areas, has that reduced the legal disputes? In other words, has it given it more clarity and certainty?

And, of course, when you have that, it does, I think, encourage and promote prompt settlement of these competing claims. So I am not going to go into the costs. The chairman and others have certainly said on the record in prior Congresses as to what has happened with a result of the costs, but I would point out, Mr. Chairman, that there is strong bipartisan support for a uniform product liability act.

Yesterday, you received a statement from the chairman of the House Energy and Commerce Committee, Congressman John Dingell. And I have a copy of that statement with me, and it certainly shows to you, at least on the House side, that both sides of the aisle intend to work together in this Congress to ensure that a uniform product liability bill passes our committee and is enacted into law.

And I join Chairman Dingell in commending you for your leadership in this issue.

Let me just conclude here, Mr. Chairman, just to say that there have been a lot of criticism, a lot of comment with respect to this bill and this has been a continuing dialog or debate over three or four Congresses, and I want to commend you for taking those criti-

cisms and taking those suggestions and working out what I call a polished and judicious solution to what is a real problem in this country, and that is what you have attempted to do.

I commend you for these hearings, but I would urge that we not have another 5 or 10 years of hearings. Let's get busy and pass a bill, and I think that your bill is a fair and balanced solution to an urgent national problem.

Thank you very much.

Senator KASTEN. We thank you very much for your testimony. I know that you have appeared before this subcommittee before. We all appreciate your leadership. At this time, I would like to place in the record the statement that the Congressman referred to, the statement by Chairman John Dingell, the chairman of the Energy and Commerce Committee.

In his statement, Congressman Dingell describes the breakdown of our legal system, what we are all talking about today, in product liability cases.

He speaks of, and I quote: "The tangled web of legal confusion and inequity" that, he believes, "clearly warrant a Federal legislative solution."

In the letter, he also expresses his support for efforts to enact uniform product liability law which will clearly establish the extent of an injured party's right to recovery and also a standard by which a manufacturer's liability will be measured.

We will put that statement in the record.

Once more, we thank you for your testimony here today.

Senator Hollings, do you have any questions?

Senator HOLLINGS. Congressman, every now and again, we on the other side are due the pleasure of reveling in supply side. Specifically, we are on the finest economic boom, the President says, that we have had in 30 years. And there is no crisis. People have been doing business in 50 States, all businessmen, and will continue to do so in different jurisdictions throughout.

On insurance premiums we will be showing in the hearings that insurance premiums in all commercial lines, not jut product liability, have all of a sudden gone up for market reasons that will be included in the record. Only yesterday, my independent insurance agents don't want the banks to take over their business. I was very interested in how, down around where I live on the coast, how the insurance premiums have quintupled, gone up five times. And, in fact, various companies they represent do not even take it. I am just talking about property insurance.

So I am listening and saying, wait a minute, all day tomorrow in a hearing I have to hear about how the insurance premiums are going up on product liability, and many exorbitant findings; whereas the contrary is true; it is generally going up throughout.

You are a States' righter. Should we take over the tort law here in Washington now and start at a National Congress and set down the procedures and principles for all tort trials? I would think not.

Specifically, you inject the idea that we ought to try to reduce the cost of doing business. I think we have. In contrast, Congressman, you and I were talking about a standard of living. We could do away with all product liability cases and you would still have the cost of doing business, of the minimum wage—there is no bill

to abolish the minimum wage in America; Social Security is a cost of doing business; unemployment compensation; clean air, clean water; OSHA, safe place to work, safe machinery. All that goes into the cost of doing business.

Now, you can get this shirt made for 18 cents an hour in downtown Shanghai, and there are a billion Chinese ready to do it. Should we reduce our standard of living to 18 cents an hour? I think it is entirely misleading to get the idea that we are now going to become competitive in world commerce by federalizing product liability cases, particularly federalizing it in 50 jurisdictions, not in the Federal jurisdictions.

You say you haven't practiced law, but what you are doing is leaving it in the 50 States to interpret these rules and principles. And the judges of North Carolina will interpret it differently than the judges of South Carolina.

There are hundreds of expressions throughout S. 100 that will require interpretation in the hundreds of State courts. And instead of uniformity, you are really adding to the cost of appeals. There, you have added to the confusion. You haven't clarified under this bill the product liability cases.

Now, if you could get it into one jurisdiction, you could have the Federal rules and you would have the Federal jurisdiction, you would have a different thing. But you don't do that. You just superimpose the ideas of the National Congress on the State courts of North Carolina.

Mr. BROYHILL. Mr. Chairman, let me respond to that. Certainly no one is advocating doing away with the environmental laws or worker safety laws. That is certainly not my intent or anyone else's. And I know that is not what you are implying. But I think the experience that the gentleman from South Dakota brought before us is not an isolated case. There are innumerable cases of these kinds, and they apply across the board to industries and particularly to those industries and to those companies that are manufacturing products that are widely distributed in interstate commerce into other States, where then they are having to buy insurance in order to protect them in case they may have a case brought in that particular State under those particular laws or under the decisions that are being brought in those jurisdictions.

In other words, the rules of law with respect to product liability today are confusing. They contradict each other across the country. If you are a manufacturer of a product, how do you protect yourself?

And I have had a number of people come to me with similar stories as the gentleman from South Dakota came today, where either the cost of product liability insurance has risen to the point that it is far more than the profits they are making, and they have a choice of going out of business or going bare. And one manufacturer in my hometown who told me that he was going bare—that is, he was not purchasing any insurance—I asked him, I said I don't understand how you sleep at night with that kind of liability hanging over you.

But that was the only choice he had, either that or laying off some 20 or 30 workers, and he decided on the course that he took.

But these products are in interstate commerce, and it is very difficult for manufacturers or the sellers of these products to predict what is going to happen or what their liability is, and so I think it is necessary that we come up with a uniform product liability code.

Senator HOLLINGS. Isn't the problem greater in health care costs? We see the blue chip corporations, the profits they are making, in fact paying no taxes. They all are doing business in 50 States. Business is good. You are a businessman. I am back in your field now.

And the truth of the matter is, let's look at the malpractice case. Why not federalize it? I had a doctor at Johns Hopkins. He won the Eye Institute Award. He operated on my eye. He never had a claim or anything else like that at Johns Hopkins, and very minimal cost for his coverage, malpractice coverage insurance premium. Now, he went over to Los Angeles. He had to pay $27,000 to go into the operating room. He had to get $27,000 in insurance premiums in Los Angeles before he could start his eye operations.

That is a real national problem, health care costs. We don't see anyone up here with a bill to try to hold down health care costs and let's federalize malpractice—if you really want to get into something that is going through the roof.

Mr. BROYHILL. Well, that probably would be another bill, another committee, another legislative jurisdiction. I will send you some articles that I have written on that subject also.

Senator HOLLINGS. But you haven't put in a bill in all your years in Congress on that. You just write articles on that one.

Mr. BROYHILL. I think we do need to look at it. And it is not in the public interest that we have a lot of physicians who are withdrawing from practice in certain areas, and certainly it is something we can discuss. As far as the taxing concern, that again is another jurisdiction. But I think perhaps you and I could talk about that, too, and come up with a more fair Tax Code than we have at the present time.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I want to just commend you on your testimony, but I want to quickly ask you three questions that I think clear up points that Fritz has raised.

First of all, now this business of States' rights. That is just the opposite, the way I see it. Now, South Dakota does not interpret anything. The consumers of South Dakota just pay higher rates, pay more for consumer products, because that argument can be used backward.

But the other side is always trying to push us into the business of being against States' rights. How do you answer that?

Mr. BROYHILL. Well, Senator, you are a learned attorney and you have had a great deal of experience with this subject matter, and had an opportunity to observe it. Have you noticed that the trial attorneys confine themselves to any one particular jurisdiction when they bring these cases, or do they shop around?

Senator PRESSLER. That is a very good illustration right there.

Mr. BROYHILL. It seems to me with that kind of situation, that we should have some uniform law that people know what the law is, what the rules of the road are, and they know what to expect. I think not only would you have far more justice for plaintiffs, but

you would have safer products and also cut out a lot of the unnecessary litigation with respect to the claims that are made.

Senator PRESSLER. The second point. Let me say that I think the present system sort of brutalizes States rights in the sense that in a State such as my State, we just pay the higher consumer costs, and a case probably won't be brought there because they will bring it someplace where they are going to get a much higher return.

The second point, I don't want to take a lot of time on this, is the international. When a company deciding where to locate a manufacturing plant, the existence of our present system may well encourage companies to go out of the country, it would seem to me. It seems to me just the opposite argument.

Mr. BROYHILL. Well, we are already seeing that, and it is very sad to see. But a lot of people are making their investments in other countries now with respect to certain kinds of machinery.

I know in our area—there I go, getting into Senator Hollings' area again—with respect to textile machinery, we find that much of it is purchased abroad today.

Senator HOLLINGS. Well, I guess while you and I are wearing ties saying "Crafted with pride in America," They are buying the foreign machinery to make the ties.

Mr. BROYHILL. But that is where it is made and many of our machinery manufacturers in my district, some of them are going out of business. And one of the reasons they cite is the liability. They just can't take that. So manufacturers overseas are taking their business.

Senator PRESSLER. Well, 30 percent of the cost of my constituent's product is product liability insurance. So if his plant was overseas, that would not be the case.

A third and final question is this business about who is protecting consumers. Now somehow, my friend Ralph Nader is on the other side of this, and I cannot understand why. It is probably a trial lawyer's orientation; I don't know.

But consumers in this country, consumers are really paying a lot more for their products.

Mr. BROYHILL. Consumers pay all of the cost. Consumers pay all of the taxes, too, as the Senator well knows, and they pay all of the costs of product liability. It seems to me that it would be in the public interest for consumers to have a more uniform set of rules or rules of the road.

You know the bill as well as I do; that there are protections for the plaintiffs all through this bill, not only with respect to the duties to warn, but with respect to the rights of the plaintiff to bring action. And I think that we ought to be talking about this. We ought to be talking about the benefit for consumers or benefits for the plaintiffs in this as well.

Thank you very much for those questions.

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. Congressman Broyhill, you stated that S. 100 would limit unnecessary litigation. How?

Mr. BROYHILL. No. If I said "limit," it is a bill in that it sets the rules of the road. I think you are going to find that you will have less frivolous suits.

Senator HOLLINGS. Why is that?

Mr. BROYHILL. I think you are going to find that people, when they know what the rules of the road are, they are going to have cases where they know what the rules are, what the law is.

Now you find where you have the courts, who are oftentimes going into new areas, getting into, you might say, writing law in the court. Much of the law of product liability is written in the court, and not necessarily written by, as you know, not written by the State legislature.

Senator HOLLINGS. How does S. 100 accomplish that? How does it limit the courts from going into the law and starting into new fields or litigation, unnecessary litigation as you stated? How does S. 100 accomplish that?

Mr. BROYHILL. I think that where we set a standard or set the rules of the road, I think that it tends to let everyone know, not only the manufacturers, but the plaintiff, bar, the defendants and so forth, know what they have a right to expect. And I think from that standpoint, we are going to have far less litigation. That is my judgment and I think that is one of the purposes of this bill.

Senator HOLLINGS. But there is no section that you could refer to more generally?

Mr. BROYHILL. I can't refer to any section, but I think the overall result will be that.

Senator HOLLINGS. You don't think now they must be getting something for their high premiums that you contend for? Their lawyers, they are paying them, and they are paying the insurance companies to defend. Don't you think they know the rules of the road?

That gentleman that testified knows the rules of the road in New Jersey.

Mr. BROYHILL. Well, I think what is happening is that we have created a situation where any kind of thing that occurs, the first inclination is to drop in a suit. Well, immediately that triggers tremendous costs, not only costs on the plaintiff's side, but on the defense side. And I think that what we need is to clear the area. You don't know where it is going to go. You don't know what jurisdiction.

If it goes into South Dakota, as the Senator has stated, you will have one result. But if it goes into another State, you will have another result. So it would seem to me that it is in the public interest of all of us to have a clear picture.

Senator HOLLINGS. It would go into the Federal court, wouldn't it?

Mr. BROYHILL. Not necessarily. It might be going to the State court.

Senator HOLLINGS. Well, you would still be going into New Jersey or still going into South Dakota, and it would still be interpreting these particular principles.

Mr. BROYHILL. It would be interpreting a national law. But I think you are going to have a more uniform code. How has the National Uniform Commercial Code, how has that operated? How has that operated over the years?

Senator HOLLINGS. Well, it depends on the State adopting the Uniform Commercial Code. What you are saying is, you are having the Congress adopt it for them. Is that what you are saying?

Mr. BROYHILL. State that again?

Senator HOLLINGS. On the Uniform Commercial Code, each State adopts that, and what you are saying is we in the Congress are adopting more or less Uniform Product Liability Code for the 50 States.

Mr. BROYHILL. Well, that is the effect of it. Right.

Thank you, Mr. Chairman.

Senator KASTEN. Thank you very much, Jim. We appreciate your testimony and look forward to working with you and also with Chairman Dingell.

[The statement follows:]

STATEMENT OF THE HON. JAMES T. BROYHILL, U.S. REPRESENTATIVE FROM NORTH CAROLINA

Mr. Chairman, I greatly appreciate your invitation to testify today in support of S. 100, "The Product Liability Act." While it is always a pleasure to appear before your distinguished subcommittee, I certainly hope that our next meeting on this subject will be at the White House signing ceremony.

Mr. Chairman, I forget exactly when we first began to work for a uniform Product Liability Act, but I seem to remember that Senator Hollings had black hair at that time.

Former Democratic Congressman Richardson Preyer and I introduced the first comprehensive proposal for a uniform product liability law almost 6 years ago. That bill, H.R. 7921, was not too different from S. 100, the bill before you today. Since the introduction of H.R. 7921, however, the product liability problem in this country has grown much worse.

Everyone loses under the current system, Mr. Chairman. Consumers, plaintiffs, defendants, and American manufacturers all suffer from the unfairness and high costs of the current system. Instead of uniformity, we have a confusing and conflicting jumble of constantly changing product liability laws, and the legal costs involved in interpreting these laws continue to soar. Other than the lawyers, who benefits from this unfair system?

Certainly it is not the injured plaintiffs. As you are aware, Mr. Chairman, some jurisdictions in this country would bar a plaintiff from filing a product liability suit even before the plaintiff realizes that he has been injured. S. 100 would prevent such an unfair result. Under current law in other jurisdictions, an injured plaintiff is prevented from recovering anything at all if he was even one-half of 1 percent responsible for his injury. Under S. 100, the plaintiff in this situation would recover virtually all of his damages. Under current law, a manufacturer's duty to warn consumers of post-manufacture defects is vague and ambiguous. S. 100 provides a clear and certain national duty to do this.

Today, whether or not a plaintiff recovers damages for an injury will often depend solely on where the suit is brought. This encourages forum shopping—it does not promote justice. More than anyone, injured victims of unsafe products need uniformity and fairness in product liability law. S. 100 will provide both.

There is no doubt that a uniform Federal act will reduce legal costs. Under a uniform act such as S. 100, State and Federal judges, attorneys, consumers, and manufacturers will look to one document to determine rights and responsibilities under the law. Our experience with the uniform commercial code and the Federal rules of evidence should provide ample proof that national uniformity can reduce legal disputes and create a measure of clarity and certainty which promotes the prompt settlement of competing claims.

Of course, there are those who have a vested interest in promoting legal conflict and confusion, and you will find them opposing S. 100; but to do this in the name of consumers is a sham and a fraud. Consumers ultimately foot the entire bill for the exorbitant legal costs caused by the current system, and no one would benefit more from the enactment of S. 100 than consumers. The attorneys who would seek to represent those consumers should forget self interest and admit this. Product liability legal costs have skyrocketed to the point where such costs greatly exceed the amounts recovered by injured plaintiffs. The spiraling legal costs resulting from the current system have hindered American industry's ability to compete with foreign manufacturers, contributed to unemployment, and raised prices for all consumers. Clearly, the time is ripe for reform of our tort litigation system.

Mr. Chairman, as you are aware, support for a uniform product liability act has always been bipartisan. As the statement you received yesterday from the House Energy and Commerce Committee Chairman John Dingell reveals, both sides of the aisle intend to work together in this Congress to ensure that a uniform product liability bill passes our committee and is enacted into law. I join Chairman Dingell in commending you for your leadership on this issue.

The provisions of your bill have been tempered by criticism and comment from three separate Congresses and three separate administrations during the past decade. S. 100 represents a polished and judicious solution to a real problem in our country, and it will provide urgently needed reform of the tort litigation system. Some may say that this bill could do more by addressing issues outside of the tort area, but as I am sure the witnesses here today will verify, America's consumers and manufacturers don't have time for another decade of hearings. Your bill provides a fair and balanced solution to an urgent national problem. Let's get on with its enactment. Thank you very much.

Senator KASTEN. Before we continue, I would like to comment on one debate which has repeated itself in past product liability hearings before this committee, and I assume it will be part of the substantive discussion today, and that is the debate as to whether a fault-based negligence standard, or a so-called strict liability standard should be applied in cases involving design defects or inadequate warnings.

Past testimony of legal experts and commentators has documented that fault is a key element in these cases in almost every State and that the fault standard imposed by this legislation in design defect and warning cases is not a significant change in the law in a majority of States.

These legal experts have explained that most States, although sometimes referring to so-called strict liability in design and warning cases, in fact, apply a fault-based analysis because most courts have recognized that the condition of the product cannot be properly evaluated without assessing the conduct of the manufacturer who produced it. It is true that a few States appear to apply a different standard in these cases, a standard which amounts to absolute liability with regard to fault.

There are those who have testified before our committee that such a no-fault standard of strict liability should be adopted to hold manufacturers liable in tort for dangers that could not have been reasonably foreseen or that were unknowable. We may hear that view expressed today, and I would like to note that if we impose such a standard in design and warning cases, we would in effect create a judicially-enforced insurance or compensation system.

I would ask, then, what use is the tort liability system at all in these cases? I am not a lawyer, but I know that for 200 years the tort system has been based on fault, and I am told that risk distribution, the shifting of the burden to the manufacturers is the justification for strict or absolute liability because the manufacturer has the deepest pockets and can pass his costs on to the consumer in the form of higher product costs.

But then why have a tort system at all? Why not a no-fault, limited damage compensation system? I think we are going to be addressing this question today.

Senator HOLLINGS. Will the Senator yield?

On the tort system of finding fault, we have in the several jurisdictions since the beginning of this Nation found fault on what we call a preponderance of evidence. Now, let us look at one example

where S. 100 does not do that. It injects a new level of finding by the Congress here in Washington that it should be clear and convincing evidence for punitive damages not by a preponderance of evidence. How will that be interpreted by the hundreds of trial judges in the 50 States over the land. It will really add to the confusion. Yes, it's on fault, but it is clear and convincing fault rather than a reasonable preponderance of the evidence. Thank you.

Senator KASTEN. Our next witness is the Honorable Richard Lugar, United States Senator from the State of Indiana.

Dick it is a pleasure to have you before our committee, and thank you very much for being here. We look forward to your testimony.

STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

Senator LUGAR. Thank you, Mr. Chairman, Senator Hollings, Senator Pressler. I appreciate this opportunity to appear before you today to address a topic of critical importance, the current state of our unpredictable and unnecessarily costly product liability system. Rather than highlighting the major provisions in S. 100, which will receive considerable coverage in the course of these hearings, I would like to focus my remarks on two aspects of this debate, the necessity of establishing uniform liability standards to maintain continued growth in our economy, and the clear benefits of this legislation to consumers and those injured by products.

As Indiana's newly elected Senator in 1977, I introduced S. 1706 that year, a bill with a three-pronged approach to product liability reform. This legislation created defenses for product misuse and state-of-the-art design and established a statute of limitations requiring product liability actions to be brought within 2 years of the date of injury or 7 years of the date of sale of the product. This basic and arguably pro-defense legislation was intended to provide desperately needed relief for businesses, especially small businesses in my State, from exorbitant product liability insurance rates at that time.

The legislation currently before the subcommittee is far different from that which I introduced in 1977. Eight years of investigation and research by the Federal Government and countless drafts and compromises have brought us a solid piece of legislation supported by product manufacturers, sellers and consumers alike. S. 100 is the result of hundreds of hours of congressional hearings in the 98th Congress and your willingness, Mr. Chairman, to accommodate the differing interests involved. A fair and balanced bill has evolved as a result.

Mr. Chairman, a growing economy and the continued creation of jobs are crucial to the future of this country. I believe that economic growth must be the touchstone of any economic plan, including the budget, tax reform, spending reductions, and product liability reform, for that matter. We must ask of each new proposal: Does it contribute to economic growth and greater employment? If so, there must be a strong presumption to move ahead.

Simply put, the virtual shopping bag of inconsistent State product liability laws currently in place act to stifle economic growth

and innovation. While there are several adverse effects of the uncertainty and confusion of the present system, I highlight the adverse effects on growth because I believe it is the most pertinent to our current economic situation. Virtually all studies of product liability law I have read have concluded the widespread variations in the 50 different State laws impede interstate commerce.

The widespread variations in product liability law from State to State create unpredictability and confusion for manufacturers. In Indiana, for example, only 17 percent of the products manufactured are consumed within the State., Therefore, the overwhelming majority of products manufactured in Indiana must comply with 50 different sets of product liability laws. How can a manufacturer design a safe product when he or she is given 52 different and contradictory signals regarding what he or she must do to avoid liability?

A second problem with the current system of varying State laws lies in its effect on product liability insurance rates. Because product liability rates are calculated on national basis, a practice also undermined by unpredictable variations in State law, these rates are understandably high. When I introduced S. 1706 in 1977, scores of letters from Indiana business owners flooded my office relaying horror stories about steep increases in product liability insurance premiums. Increases in premiums over 5,000 percent in 1971 to 1977 were not unusual. There has been no change since that time to slow exorbitant liability rates which, of course, are passed on to consumers. This system threatens the very existence of many small businesses.

These high insurance rates are passed on to consumers in the form of higher prices for the products they buy. Since product liability insurance is computed on a national basis, Indiana consumers actually pay more for products they buy, even though Indiana has a restrict product liability law in place. The current system is unfair to Indiana consumers who, in effect, must pay a product liability tax without receiving any benefit.

Mr. Chairman, you have heard the often quoted figure that 18 percent of the cost of a stepladder is product liability insurance. This real cost is built into the price of other products as well, and there is no reason that Indiana consumers should pay more for products, that is, pay a product liability tax, because persons in other States may bring spurious product liability lawsuits against manufacturers.

The cost of product liability insurance is not the only unnecessary expense caused by the current system. The unclear tort law system creates enormous legal costs. Where the guiding principles of law are unclear, litigation costs soar for all parties. Time and effort must be expended to determine the applicable standards of liability, and increase costs are incurred due to the incentives in our common law system to argue for modification and reversal.

Mr. Chairman, my strong support for this legislation is not based solely on the clear rules and uniformity it would provide manufacturers or the lower product costs it would achieve for consumers. I do not want to create the impression that lower costs and uniformity of product liability laws should be furthered at the expense of consumer safety. It is important to note that S. 100 contains clear

benefits for those injured by products. In fact, in many States like Indiana, this legislation would be better for injured parties than the existing law.

S. 100 contains a very proconsumer rule that allows persons to bring claims within 2 years after they have discovered both the harm and its cause. Indiana, like some 13 other States, has a time of injury statute of limitations that cuts off a consumer's right to bring actions 2 years after the injury occurs. In cases involving injuries caused by drugs, asbestos, and other latent injuries, the consumer may not even know that he has suffered an injury until many years after the fact.

S. 100 also proposes a long statute of repose of 25 years, only for capital goods. Indiana has a 10 year statute of repose which bars all actions that are not filed within 10 years after initial delivery of the product. This rule in Indiana applies to all types of products, including consumer goods and asbestos-containing products where injuries generally do not manifest themselves for many years after delivery of the product.

S. 100 adopts the rule of pure comparative responsibility which allows a person to recover even if he or she has been 99 percent at fault in the accident. Indiana's modified comparative fault rule completely bars a person from recovering damages if his fault is greater than 50 percent of the total fault involved in the incident.

Mr. Chairman, it is clear to me from this outline of some of the provisions contained in S. 100 that the passage of a uniform body of product liability law will benefit consumers. It is imperative that Congress enact a uniform product liability act which has been subject to the careful review and compromise of the congressional process. Manufacturers will have clear standards of liability, legal costs will be reduced, and safety will be promoted.

I urge swift passage of S. 100. Thank you.

Senator KASTEN. Senator, we particularly appreciate hearing your remarks because you have been involved for so long in the effort to establish uniform product liability law. We deeply appreciate your being here with us this morning. We thank you for your continuing support.

Senator Hollings, do you have any questions at this time?

Senator HOLLINGS. Yes.

Senator, You think like a good lawyer, and as the chairman has pointed out, you have been involved quite a while. Let's say that Congress is about to make a finding that product liability cases are an undue burden on their State commerce. Why is it you do not find a Federal cause of action to give Federal jurisdiction? Instead, you are imposing all these novel provisions on 50 States to be interpreted.

I will give you one, the clear and convincing standard for punitive damages. You know, in the tort law we have always used the greater weight of the evidence, the preponderance of the evidence in the trial of a tort case. Clear and convincing to me means if you are convinced, you are convinced beyond a doubt. And yet it says those not convinced beyond a doubt, how are you going to interpret that for example? And then how is Senator or Judge Pressler going to determine it in South Dakota? And where is the simplicity that you are trying to get in the uniformity? Chief Justice Pope's testi-

mony points out many other examples as does Professor Twerski's from last year's hearing.

Senator LUGAR. Well, I would admit the Senator's point is well taken, that sometimes a quest for simplicity leads to more complexity. Clearly, the S. 100 legislation, which has evolved from the modest attempt that I made and others a while back, is a compromise of a good number of situations. I would admit that there are some novel principles of law, this idea that somebody can be 99 percent guilty, or found that, and still get some recovery out of this is an unusual concept, even of one that may lead to some fairness and equity. But rather than attempt to argue the principles of law that are involved, I see this as a pragmatic compromise of various forces in our economy over the course of time, that I think will promote, as I suggested, a greater fairness, probably economic growth, greater certainty for manufacturers. These at least I have seen as principles that were preeminent in the debate.

Senator HOLLINGS. Thank you, Mr. Chairman.

Senator KASTEN. Senator Pressler?

Senator PRESSLER. Let me compliment you on your statement.

You said that Indiana consumers actually pay more for products they buy even though Indiana has a restrictive product liability law in place. I think that is the answer on the States rights thing. We are always being accused, those of us who support this legislation, of abandoning our principles on States rights, but the fact of the matter is right now States are being imposed, your State, the consumers are paying, even though they have got in their State the restrictive thing, they have to pay the higher insurance premiums because all the other States are doing it.

Senator LUGAR. I agree, and thank you, Senator, for underlining that testimony.

Senator PRESSLER. You devote a paragraph to my second point. I think this is really important, this whole debate about consumers. These consumer groups are making noises that this is anticonsumer legislation, and they should be on our side, they really should, because the costs to consumers of this—and I compliment you on that, and if you want to expand in any way on that, I would appreciate it——

Senator LUGAR. Well, I would not expand on it. I cited those examples in my own parochial situation of Indiana simply to indicate that State legislatures, other legislatures have tried to act in this area. Indiana did so largely for the same reasons that my constituents wanted me to act when I came here, and they came up with some hard and fast deadlines for the bringing of actions.

I think this committee has reviewed the equities of that and found that that was not nearly as happy a situation for consumers, maybe even for manufacturers, as was first thought. This is why I compliment the extensive hearings that have occurred here, the massaging of many interests over the course of time. But I just concluded that the provisions of S. 100 are pro-consumer in the way that I had cited that at least 13 other States that have acted in this way really are not.

Senator PRESSLER. Thank you very much.

Senator KASTEN. Senator, we thank you very much for your testimony here this morning.

Our next panel will include Mr. Schwartz, Mr. Dreier, Mr. Williams, Ms. Robson and Mr. Kimmelman.

If all can come forward and take their positions at the table.

As we begin the panels, I would just simply want to remind the witnesses that your entire statement will be made part of the record. You are going to be asked to summarize your statement. We are going to try work with a system of lights so that we can control the time, and we will also work with a system of lights with the questions as we proceed through the Senators on the committee.

The first witness is Mr Victor Schwartz, counsel to the Product Liability Alliance.

Mr. Schwartz.

STATEMENT OF VICTOR E. SCHWARTZ, COUNSEL TO THE PRODUCT LIABILITY ALLIANCE; HON. WILLIAM A. DREIER, JUDGE, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION; MICHAEL L. WILLIAMS, COUNSEL, EUGENE, OR; AND GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. SCHWARTZ. I will briefly summarize my statement.

I am speaking for the Product Liability Alliance, which has over 200 members that represent literally thousands of small, medium and large businesses that are profoundly affected, adversely affected by product liability problems.

Today I would just like to make three brief points: first, to make clear the need and purpose of this legislation; second, to dispel two myths that have arisen about it; and finally, to help avoid this committee getting into a morass about this bill from which it will never extricate itself.

First, the purpose. There are really three purposes, and most of them have been stated. This bill will reduce legal costs by having uniform product liability laws and rules. Second, it will promote safety because its purpose, every section's purpose is to place incentives for the prevention of risks on parties who can do something about it. Sometimes it is the manufacturer, sometimes it is the product seller, sometimes it is employers, and sometimes it is people who use products. And finally, it will eliminate unfairness in product liability law on both sides of the aisle by ridding our law of impediments of plaintiffs that have too long been in the law, such as restrictive statutes of limitations, contributory negligence defenses. On the other hand S. 100 will get rid of rules that have permitted bizarre recoveries that we have heard about so frequently in these hearings.

Second, I would like to address myself to two myths. The Commerce Committee report that appeared last year suggested, in the dissent, that S. 100 will create "a cure worse than the disease." It was said that the law will become mired down in endless and conflicting interpretations and be in effect a lawyers' relief act. Curiously, the same arguments were made against the implementation of civil procedure codes in the 1950's. The same arguments were made against the Federal Rules of Evidence. Everytime a uniform rule has been put forward, opponents who sometimes have other

reasons to oppose the bill say they will get mired down in conflicting interpretations. I suggest to this committee that none of those reforms efforts in the past have ever been repealed, and there has always been more harmony in the law after they have been enacted than before.

Further, under this bill, although State courts are interpreting it, they must look under the Constitution to Federal courts for guidelines. This will bring about uniformity.

A second and perhaps politically more sensitive myth is that S. 100 is somehow anticonsumer because it uses a fault-based standard in design and warning cases.

It has been argued that throughout the Nation right now courts are applying strict liability. We have said in hearing after hearing that most courts are inextricably tied to fault-based concepts. In the past, it has been a debate between two sides, and I think some people would be reasonably left in equipoise as to who is right. But in the past year the courts in the United States have spoken directly to this issue: is it fault or is it not.

The Supreme Court of Minnesota, in a design case, said an objective standard should be applied where reasonable care is the balancing test.

Several weeks ago the Supreme Court of Michigan said "although many courts have insisted that the risk-utility tests they are applying are not negligence tests because they focus on the product rather than on the manufacturer's conduct, the distinction, on closer examination, appears to be nothing more than semantics. As a common sense matter, a jury weighs competing facts presented in evidence and reaches a conclusion or a judgment about the conduct of the manufacturer. The underlying negligence calculus is inescapable." The court said that it had engaged in an effort to confuse rather than to enlighten, it went for a negligence standard.

Even in New Jersey where the *Beshada* case came forward as absolute liability as other witnesses will state, there has been a retreat, and that case has been confined to its facts. Opponents have argued that negligence is too hard to prove, and yet negligence has been proven in cases again and again and again throughout the United States.

In S. 100, two of the most anticonsumer stumbling blocks in the law have been removed. As I have stated, it is true that certain cases will be eliminated. Recently there is a case where a person who swallowed a razor blade sued the manufacturer alleging the blade was not made of stainless steel and could not be seem in an x-ray. Another person who had coronary disease sued a lawn mower manufacturer when he found it too hard to pull the string on the lawn mower. Another State might say if the cord was too easy to pull, it would be an attractive nuisance to a child.

The bill is not anticonsumer. It is unfair, as some so called consumer groups have done, to ignore all the pro-consumer changes and modifications have been made in this bill.

Finally, I would like to address the question of the "inextricable morass," the mud pie that we could get into if we attempt now to try to design at the same time a comprehensive compensation system. This very point was studied by the Federal Interagency Task Force. They said this is an area that must be studied first,

and second, it only can be developed a reasonable time after the tort law is stabilized. If one tries to build a roof on a building before the foundation is set, that effort will fail.

To reach the goal of compensating persons who recover under our present system, as well as the goals of reducing legal costs, promoting safety and having a fair and balanced product liability legislation, S. 100 should be enacted now.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ FOR THE PRODUCT LIABILITY ALLIANCE

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify on behalf of the Product Liability Alliance [TPLA]. TPLA's over 200 members represent literally thousands of small, medium, and large businesses who are profoundly and adversely affected by the product liability problems I will describe this morning. TPLA supports the prompt enactment of S. 100, the Federal Product Liability Act. The present system of unclear and conflicting state product liability laws compromises safety and creates unnecessary and burdensome legal costs.

NEED FOR UNIFORM PRODUCT LIABILITY RULES

As reflected in the hearings before this Subcommittee during the 98th Congress [1] and in the report of the Commerce Committee on S. 44,[2] there is a clear need for Federal legislation setting forth clear and uniform legal theories under which claimants may recover for injuries caused by defective products. Today's product liability rules, determined almost exclusively by judges in state courts, vary from state to state and also within each state. The current product liability tort system is a maze of 51 sets of uncertain, contradictory and ever-changing rules created by judges on a case-by-case basis. The current system is costly, impedes product safety, and benefits only the lawyers, who earn large fees for litigating the confusing and uncertain legal issues.

The current system also is a cause of rising costs of product liability insurance. Uncertainty in product liability law makes it very difficult, and often impossible, to predict the numbers of claims and losses a manufacturer can expect. Not only have insurance rates been rising, but some insurance companies have been restricting the availability of coverage. Some manufacturers, such as manufacturers in the sporting goods industry, find it difficult to obtain insurance at any price. This is because a few courts have imposed liability on manufacturers for sports injuries even though there was nothing wrong with the sports equipment. The uncertainty in product liability rules contributes to insurance problems.

UNIFORM RULES WILL REDUCE LEGAL COST

Confusing and conflicting rules increase the costs of litigating claims against manufacturers and product sellers. Attorneys for all parties must spend much time and effort to determine the applicable legal rules. Because the rules on a particular legal issue are often unclear or contradictory between states or within a state, the parties spend an excessive amount of time in trying to persuade the court to apply the legal standard that would aid their case. This occurs before the court even reaches the facts and merits of the case. The lack of clear legal rules impedes settlement and causes parties to incur the costs of trial in cases that might otherwise be settled. Because the common law is subject to modification or reversal in every case, all parties have an incentive to appeal cases and re-brief the issues. The result of the current system is increased litigation costs in product liability lawsuits. In fact, a recent study by the Rand Corporation shows that for every $59 awarded to an injured party, lawyers on both sides get $99.[3]

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[1] Product Liability Act: Hearing on S. 44 Before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, Serial No. 98-302, 98th Cong., 2d Sess. (1984).

[2] S. Rep. No. 476, 98th Cong., 2d Sess. (1984).

[3] In a study by the Rand Corporation's Institute for Civil Justice on the costs of asbestos litigation from the early 1970s through the end of 1982, average defense costs are estimated at 58 percent of total compensation paid, while plaintiff legal fees and expenses are estimated at 41 percent of the gross payments to plaintiffs.

A uniform product liability law would substantially reduce litigation costs. Courts will be applying a written statute that specifies the general rules of liability. Because the rules will be statutory, they will be permanent. Plaintiffs and defendants will not be able to ask judges to modify the rules of liability in each case. This will reduce litigation and re-litigation of legal issues. Clear legal standards that tell parties what their rights and obligations are will foster settlement of cases and, thereby, reduce legal costs.

S. 100 WILL ACHIEVE UNIFORMITY

Uniformity in product liability rules can be achieved only through Federal legislation. The states have not and cannot achieve unformity in product liability law. After the product liability problem was identified in the 1970's, the Uniform Product Liability Act ["UPLA"] was drafted for enactment by the states. UPLA has not been adopted in full in any state, and while over 30 states do have some form of product liability statute, they have not resolved the uncertainites in the tort litigation system. Most state statutes are not comprehensive and fail to address the key issues that arise in product liability litigation. Furthermore, no two state statutes are alike. Certainty within one state does not resolve the tort litigation problems facing those who manufacture and sell products in an interstate market because products are manufactured, sold, and used on a nationwide basis. A 1981 Report by the American Bar Association Section of Corporation, Banking and Business Law to the House of Delegates showed that over 70 percent of goods manufactured in a state are consumed outside the state.

It has been argued by opponents of S. 100 that the "cure will be worse than the disease." It is said that the bill will become mired down in endless and conflicting interpretations and be a lawyers' relief act. This simply is not the case. Let us look at the facts. S. 100 will produce certainty and uniformity in product liability law because all courts will be interpreting and applying a single statute—a statute that has been refined and re-refined by extraordinary time consuming work by this Committee and its staff. Courts interpreting and applying this statute will achieve greater uniformity than courts which are guided by no unifying principles, or guided by conflicting non-uniform statutes. Furthermore, state courts will not be free to interpret S. 100 in any manner they wish—they will be required to follow and apply federal court decisions interpreting the Product Liability Act. Under the Supremacy Clause of the United States Constitution, state courts are bound to apply federal law.[4] State courts applying federal laws are bound to follow decisions of federal courts.[5] Thus, state courts would not be free to apply a federal product liability law in any way they saw fit. They must follow federal precedent.

Congress clearly has the power under the Commerce Clause of the Constitution to enact a uniform product liability act. The diverse and conflicting rules of liability for harm caused by defective products clearly affect interstate and intrastate activities which affect interstate commerce and, therefore, includes manufacturing and selling, which by their nature affect commerce among and between the states. The fact that tort law is traditionally a matter of state law does not alter this rule. Congress has enacted a number of statutes regarding liability for injuries which preempt state law such as the Longshoreman and Harbor Workers' Compensation Act, the Price-Anderson Act, and the Federal Employers' Liability Act.

UNIFORM RULES WILL PROMOTE PRODUCT SAFETY

A second adverse effect of the current product liability system is that it impedes product safety. Conflicting and uncertain rules make it difficult for injured persons to know their rights. They have no way of knowing whether they will recover for their injuries. Conflicting and uncertain rules make it difficult for manufacturers to know their obligations. In a recent case for example, a man was awarded $1.2 million for a heart attack that he alleged was caused by the excessive force required on the pullrope of his lawnmower.[6] In another state, the manufacturer may have been subject to liability if the lawnmower was too easy to start and resulted in injury to a young child who started the mower.[7] On the other hand, the current system in

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[4] U.S. Const. Art. VI, cl.2.

[5] *See, Dice* v. *Akron, Canton & Youngstown RailRoad Co.*, 342 U.S. 359 (1952) (Federal Employers' Liability Act).

[6] *Shares* v. *Sears, Roebuck & Co*, No. 2984 (Pa. Super. Ct. or Commw. Ct. April 27, 1984).

[7] *See, e.g., Kavanaugh* v. *Kavanaugh*, 641 P.2d 258 (Ariz. Ct. App. ¶ 98).

some states will allow manufacturers to avoid liability even when they are at fault (i.e., the contributory negligence defense). Given this conflict between the states, a manufacturer can potentially be liable no matter what he does or, sometimes, avoid liability even though he is at fault. In short, persons who manufacture products are in the dark when it comes to planning for safety. Product safety is seriously compromised.

S. 100 gives manufactures a single, clear, unambiguous signal regarding product safety. Manufacturers will no longer be faced with 51 confusing and contradictory rules which impede safety efforts because designing a product to comply with one state's rules may result in liability under another state's rules. Instead, they will have a single set of rules telling them exactly what they are obligated to do to make their products safe. There will be no escape hatch for wrongful conduct.

In addition to giving manufacturers a single set of clear rules telling them what they must do to make their product safe, S. 100 will promote product safety by pinpointing responsibility. Its goal is to place incentives for risk avoidance where they do the most good. To achieve this goal, the bill has various provisions that ensure that the one who is responsible for causing a person harm will pay. For example, it makes the manufacturer liable where it has caused an injury and makes the product seller liable where it has done so. And, it doesn't let the defendant off-the-hook in cases where a person has been exposed to a drug or chemical many years before the injury manifests itself.

In many states, employers are permitted to recover from a manufacturer of a product that was involved in the workplace injury the amount compensation benefits paid to the employee. In those states, the manufacturer pays not only for the portion of harm it caused, but also for harm caused by the employer and, further, the manufacturer pays the employer for workers' compensation benefits. S. 100 does not permit employers to recover from manufacturers reimbursement for workers' compensation benefits paid its employees. This will reduce unnecessary legal costs and provide an incentive to keep workplace accidents to a minimum. These rules encourage safety.

S. 100 SETS FORTH CLEAR, WORKABLE AND FAIR RULES

S. 100's legal standards of responsibility are very clear and easy to understand. The bill simplifies the current product liability standards. Under current law, a single case may be brought under a variety of different legal claims (e.g., negligence, strict liability, implied and expressed warranty in contract, misrepresentation, fraud). A claimant now alleges multiple claims for recovery and must plead and prove the elements of each claim. S. 100 combines all legal theories into a single product liability cause of action. S. 100 discards the confusing and complicated legal labels used under current law and focuses instead on the type of defect involved in the product. There are four possible types of product liability theories which are actionable: (1) a manufacturing or construction defect, (2) a design defect, (3) an inadequate warning, and (4) the breach of an express warranty.

This approach does not eliminate any claims that legitimately may be brought under current law; rather, it simply re-categorizes the claims into these four simple and clear types of defects. For example, under current law a person injured in a automobile accident because an important part in the steering mechanism was not properly secured and fell off could sue the manfufacturer of the automobile under a variety of legal claims (e.g., strict liability for an "unreasonably dangerous" automobile, negligence in manufacturing the automobile, implied warranty that automobile parts would be properly secured). The claimant would have to plead and prove the technical elements of each of those legal claims. Under S. 100, however, the focus would be on what was wrong with the product—the manufacturer failed to properly secure the part in the steering mechanism. Thus, the injured person would have a claim for defective manufacture of construction of the automobile. The approach is much simpler, and the legal standards are much clearer.

The legal standards for the four types of product defects are fair, workable, and consistent with state law. S. 100 applies strict liability where it has been shown to work and applies a fault standard where strict liability cannot work. In cases involving manufacture or construction defects and express warranty claims, the legal standard is strict liability. Strict liability is fair in construction and manufacturer defect cases because it would be very difficult for a claimant to prove how in the manufacturing process the defect occurred. Strict liability works well in these cases because it is very easy for a jury to make an objective comparison between the product that the manufacturer intended to make and the product which causes the claimant injury. The jury can easily compare the product that caused the claimant's

injury to the other products that the manufacturer made or the manufacturer's own design specifications. A strict liability standard also works well in breach of warranty cases. It is usually not difficult for a jury to compare the produce which allegedly caused the injury to product's performance as expressly warranted by the manufacturer.

Opponents of S. 100 have perpetuated a myth that S. 100 is an anticonsumer bill because it uses a fault-based standard in design defect and warning cases. This argument is false. In practice, most courts that characterize their standards as "strict liability" have developed certain "tests" or methods of analysis that are inextricably tied to fault-based concepts. These standards, as applied, end up looking at the manufacturer's conduct.

Some courts apply a "risk-utility" balancing test that measures the magnitude and probablility of risks that could be caused by a product against the social utility of the product and the burden on the manufacturer to avoid the risk. Because it has to evaluate the product according to its risks as they were known at the time of sale, this test, in essence, evaluates the propriety of the defendant's judgment or conduct. Other courts say that a product is in a "defective condition unreasonably dangerous" if it is determined that a product is unsafe beyond the ordinary consumer's reasonable expectation. The consumer expectation test requires a manufacturer to act as the "ordinary consumer" would expect. Properly applied, this test evaluates the conduct of a manufacturer and is not a true strict liability test focusing solely on the product.

In both design defect cases and failure to warn cases, a strict liability standard provides no guidelines to which a manufacturer can conform his conduct his conduct in order to avoid or minimize liability. Under a fault-based standard, a manufacturer that has exercised reasonable care in selecting a design or warning about a product danger, has done everything he could reasonably do to make the product safe. If a manufacturer is asked to do more, to do the impossible, incentives for safety are absent. And, imposing liability is unfair.

In fact, several state courts have explicitly held that the tests for negligence and strict liability in design defect cases are the same and that design defect cases involve a single standard of liability—negligence. The Minnesota Supreme Court recently adopted in a design defect case, "an objective standard and reasonble care balancing test, which focuses on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors." [8] The Michigian Supreme Court very recently held that in a product liability action against a manufacturer for an alleged defect in the design of its product, the jury need only to be instructed on a single unified theory of negligent design. The court stated, in words that almost parallel the statements we made to this Committment last year:

"Although many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the product rather than the manufacturer's conduct, . . . , the distinction on closer examination appears to be nothing more than semantic. As a common-sense matter, the jury weighs competing factors presented in evidence and reaches a conclusion about the judgment or decision (i.e., conduct) of the manufacturer. The underlying negligence calculus is inescapable." [9]

The court stated that characterization of the legal standard in design defect cases as "strict liability" is misleading and serves only to confuse the jury.

"We are persuaded that in so doing in the context of cases against the manufacturers of products based upon allegations of defective design, we have engaged in a practice that may have served to confuse, rather than enlighten, jurors, who must ultimately apply understandable guidelines if they are to justly adjudicate the rights and duties of all parties. Imposing a negligence standard for design defect litigation, is only to define in a coherent fashion what our litigants in this case are in fact arguing and what our jurors are in essence analyzing. Thus we adopt, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design." [10]

In fact, a number of law professors have reached the conclusion that a negligence standard is the only test that is fair and workable for design defect cases. They include professors Shiela Birnbaum, William Powers, James Henderson and Aaron Twerski.

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[8] *Bilotta* v. *Kelley Company, Inc.*, 346 N.W. 2d 616 (Minn. 1984), on remand, 358, N.W.2d 679 (Minn. 1984).

[9] *Prentis* v. *Yale Manufacturing co.*, —— Mich.—— (Dec. 28, 1984), (citations omitted).

[10] *Id.*

A true "strict liability" standard has been applied in one well known warning case, *Beshada* v. *Johns-Manville Products Corp.*,[11] in which the New Jersey Supreme Court held that manufacturers of asbestos products could be liable for failing to warn of dangers associated with their products regardless of whether they reasonably could have known about those dangers at the time the products were sold. Two years later, however, in *Feldman* v. *Lederle Laboratory*,[12] the New Jersey Supreme Court backed-off its *Beshada* ruling by holding that when the alleged product defect consists of an improper warning, reasonableness of the defendant's conduct is a factor in determining liability. In this case involving injuries allegedly caused by an antibiotic ethical drug, the New Jersey Supreme Court limited the *Beshada* decision to its facts. Thus, even the New Jersey courts continue to apply a fault-based standard for design defect and warning defect cases. S. 100 is consistent with state law. It is true that S. 100 does not apply a "strict liability" standard in these cases, but a tough and severe fault standard—it requires manufacturers to exercise "the care, attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interest of others." (Section 2(4)).

The bill will not, contrary to the mistaken view of some, add to the plaintiff's burden of proof (or the legal services necessary to establish a claim). This view is plainly wrong. In a recent decision, the California Supreme Court state:

"[M]ost of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the risk-benefit standard, e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case. . . ." [13]

In other words, the kind of evidence that will be presented to juries under S. 100 will be essentially the same evidence that is presented today. No greater effort will be required of plaintiffs and their lawyers.

S. 100 BALANCES THE INTERESTS OF PLAINTIFFS AND DEFENDANTS

The allegations of S. 100's opponents that the bill is anti-consumer are simply wrong. The bill takes a "middle-of-the-road" position in product liability law. It eliminates unfairness on both sides—its rules are fair to manufacturers and it adopts some very pro-consumer rules that are better than for claimants than existing state law.

S. 100's strict liability standard in manufacturing or construction defect and express warranty defect cases is consistent with the law in virtually all states. The fault-based standard in design defect and warning defect cases is consistent with the fault-based standard of liability as it is in fact applied by many, if not most, state courts. Its provisions on product misuse, alteration, or modification are based on the rules applied by the majority of states.

S. 100 applies a rule of "pure" comparative responsibility which permits a claimant to recover damages even if his or her own conduct contributed substantially to the harm. This is much better than the rule in some states where a claimant is completely barred from recovery if his conduct was at all contributory toward the injury or in other states where a claimant cannot recover if his own negligence was greater than 50 percent of the cause of the injury. S. 100 leaves the issue of joint and several liability to state law.

S. 100 excludes evidence that a manufacturer improved the product or took other remedial measures after an event occurred. This rule is based on the Federal Rules of Evidence and has been adopted by statute or case law in a majority of states. It is based on the principle that this evidence is not relevant to proving whether the manufacturer acted wrongfully at the time it made or sold the product and on the societal goal of encouraging manufacturers to improve their products.

S. 100 adopts a very pro-consumer statute of limitations. The bill provides that a claim may be brought any time within two years after the claimant discovers or should have discovered both his harm and its cause. This rule is very favorable for claimants if the harm has a latency period or if the harm becomes manifest only after repeated exposure to the product. This is much better than the rule in many states which may bar claims for latent harm because of statute of limitations begins to run at the time of exposure to the product.

The bill provides that punitive damages may be awarded to any claimant who establishes that the defendant acted with "reckless disregard" for the safety of prod-

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[11] *Beshada* v. *Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).
[12] *Feldman* v. *Lederle Laboratory*, 97 N.J. 429, 479 A.2d 374 (1984).
[13] *Campbell* v. *General Motors Corp.*, 1983 Prod. Liab. Rep. (CCH) ¶ 9365 (Cal. 1983).

uct users. The punitive damage provision in S. 100 is consistent with the recommendations of leading scholars [14] and very close to provisions in the law in Minnesota, Oregon, and Connecticut.[15]

The Federal Product Liability Act is a fair piece of legislation that has evolved over many years. It balances the interest of both business and consumers. It does not cut off consumers' right to bring claims for injuries causes by defective products. The kinds of cases it will discourage, however, are the outrageous ones.

For example, in a recent case a person who swallowed a razorblade sued Gillette alleging that the blade was not made of stainless steel as warranted because it did not show up on an x-ray after it was swallowed. Even though no recovery was allowed in this case, it illustrates the bizarre and totally frivolous suits which are filed in courts today and for which manufacturers must pay extensive legal fees to disprove liability.[16] The damage awards and legal costs in defending these outrageous cases eventually are passed on to consumers. Discouraging the bringing of these kinds of cases will result in savings that will be reflected in the price of products.

ALTERNATIVE COMPENSATION SYSTEM PROPOSALS

Some critics of S. 100 say that the bill does not do anything to help persons injured by products if they cannot prove that the manufacturer should have known of the product's risk at the time it made the product or cannot identify the manufacturer of the product. These claimants cannot recover under current law in the overwhelming majority of states. Today, proposals are being discussed that would establish a compensation system for these persons.

S. 100 recognizes that although it is worthwhile and important to look at these problems, now is not the time to establish a compensation system. In a section of the bill proposed by Senator Danforth, S. 100 establishes a Product Liability Review Panel to study the need for Federal legislation for persons who are unable to bring a tort action because the manufacturer of the product did not know and could not have known at the time it produced the product about the danger that caused the harm or because they are unable to identify the manufacturer of the product that caused the harm.

This problem is not a new one. It was identified eight years ago by the Interagency Task Force on Product Liability, which was formed in 1976 to study the effect of product liability law on soaring insurance rates that were reaching crisis levels. In its Final Report, the Task Force stated:

"Proposals relating to product liability no-fault approaches for consumer-related injuries are perhaps the most frustrating of remedies that the Task Force has studied. On the one hand, there are very strong reasons for recommending such systems, e.g., they may bring more certainty into product liability law, increase the number of persons who are compensated and render such compensation more precise, and also have the potential of reducing transaction costs. On the other hand, no-fault brings with it major problems in regard to designing both a means and scope of insurance coverage, resolving causation issues and ensuring that the system places sufficient incentive for safety on manufacturers' products.

". . . nevertheless, no-fault does not represent an immediate solution to the product liability problem, and these pressures may be directed toward a practical impossibility. First, modified no-fault plans do not appear to be responsive to those pressures. They leave too much to chance. On the other hand, we are uncertain whether a practical no-fault first-party system can be developed, a system both large and small private insurers would be willing to underwrite and service at insurance rates that would be both available and affordable for large and small businesses.

"In our research, we did not conduct an exhaustive analysis of such a system. We conclude that it would be useful to conduct an additional study to determine whether a practical working model could be developed. . . ." [17]

Based on the Task Force's Final Report, the United States Department of commerce prepared an options paper regarding what action, if any, the Federal government should take to address the product liability problem.[18] The Department of

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[14] See Owens, *Problems, in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chic. L. Rev. 1 (1982).

[15] *See* Minn. Stat. Ann. § 549.20 (Supp. 1981); Or. Rev. Stats. § 30.925 (1) (1979); Conn. Gen. Stat. § 52-240b (Supp. 1981).

[16] *May* v. *Gillette Razor Company*, 464 N.E. 2d 401 (Mass. App. Ct. 1984).

[17] Federal Interagency Task Force on Product Liability, Final Report (1977), pp VII-228.

[18] Dept. of Commerce Options Paper on Product Liability and Accident Compensations Issues, 43 Fed. Reg. 14612 (April 6, 1978).

Commerce's Options Paper recommended to the White House that a study should be done to determine whether a practical working model for a consumer product liability no-fault compensation system could be formulated.[19] This recommendation was made seven years ago and a study has not yet been made.

It was the conclusion of both the Interagency Task Force and the Department of Commerce Task Force that a no-fault product liability compensation system should not be established until research showed that a practicable and workable system could be developed. The time has come perhaps for such a study to be done. S. 100 establishes a Federal Product Liability Review Panel whose purpose is to conduct precisely such a study. This provision in the bill is supported by Professor Jeffrey O'Connell, one of the nation's leading authorities on compensation systems. He stated, "I am especially impressed with the provisions in S. 44, which provisions are sponsored, as I understand it, by Senator Danforth, for a study of the operation of product liability law, especially as it affects those ineligible for payment under the restrictive eligibilities dictated by tort law, even as amended by S. 44." [20]

Until we know what the tort law rules are and until we have had an opportunity to see them in practical operation, it is premature to develop systems for those who fall between the cracks of the tort system. When such systems are developed, the experts who develop them will need that experience. You cannot build a roof, no matter how perfect, without first establishing a firm foundation. That foundation in this case is a fair and balanced Federal Product Liability Law, S. 100.

S. 100 is a bill that achieves important goals. It will provide clear and fair rules of liability for harm caused by defective products, simplify the legal theories applicable to product liability claims, reduce unnecessary legal costs, promote safety, and eliminate unfairness on both sides—plaintiff and defendant. It is clear that uniformity in product liability law is needed. S. 100 achieves uniformity and sets forth substantive rules that are fair and are consistent with current law as it is applied in the majority of the states.

Senator KASTEN. Mr. Schwartz, we thank you very much.

We are going to go through the entire panel and then ask the Senators to ask questions of the entire panel or individual panel members.

Our next witness is the Honorable William Dreier of the Appellate Division of the Superior Court of New Jersey.

Mr. DREIER. First, having been invited to speak here, I will say I have no constituency. As a tenured member of the court, I have no clients, and do not come from a background of either consumers or manufacturers.

I have given you my background in my prepared statement. I have lectured nationally on this subject and have written a New Jersey text on this subject, although New Jersey has always been given as the bad example. Over the period of the last 15 years we have gone from a State like any other to perhaps one of the most liberal, vying with California, but have now turned back to I think a very reasonable interpretation of product liability law. We have experimented, we have tried, and in areas we have gone to the outer reaches but then come back to workable doctrines.

I suggest that, without war stories, the history that your staff members can give you concerning how New Jersey law has progressed shows that there is a broad background that I can speak from. I believe there is a need for this bill. I am not saying a bill, I am saying this bill. It, however, needs some fine tuning. There are amended coverage questions I think that should be answered. I think both for plaintiff and for defendant this bill needs some changes; but it does more than any I have seen. I have read many,

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[19] *Id.*, 43 Fed. Reg. at 14618.

[20] Letter from Professor Jeffrey O'Connell, University of Virginia School of Law, to Senator Robert W. Kasten, Jr. (July 16, 1984).

both at the State level, and have seen, of course, and studied S. 44 last year.

We have to realize that product liability is only one part of the field of tort law. Other areas such as medical malpractice, et cetera, have mainly local impact; there you have very little interstate effect. In this area, however, there is substantial interstate effect, and we need national direction. I have sat as a judge, first 10 years as a trial judge and now 2 on the appellate level, and I still sit day to day and see the results of people trying to get into or out of our jurisdiction based upon differences in the law. It should not be.

These questions may be settled but can only be settled by you at the national level. There are problems that plague the field that are put to rest with the Federal legislation with the idea that the U.S. Supreme Court finally could determine issues, or the Congress, if the issues became enough of a problem, could amend the law and settle the issues for the country if the Federal courts have not done it. We even will be able, regionally, to look to the courts of appeal, when they will interpret this Federal legislation. I think we finally can have rational standards.

This question of fault being asserted with respect to design defects also is not one I think that we really have to worry about. As I said, with the New Jersey experiments, we went all the way out, as Mr. Schwartz said, to the *Beshada* case—which was about the limit that one could go. We saw that it was unworkable, and within 1 year we overruled the case, although not in so many words. It was confined to its facts, and then a statement in that opinion said: but these facts cannot rise again. So we have really overruled the *Beshada* case.

We have seen, however, in the case that overruled it, the *Feldman* case, that the fault standard is there. The court by analysis and reanalysis finally came back to the point that if you are going to look at a manufacturer's conduct to determine whether it was reasonable to put the product, designed that way on the market, in order to determine whether the product itself was designed properly or improperly, your focus is forced to shift from the product to the manufacturer. We are left with only one minor difference between strict liability and negligence law in New Jersey, and that is that the burden of coming forward, or the burden of proof has shifted as to what standards are in the industry, from the plaintiff to the defendant, as it is the defendant that knows the standards of its industry. If it is going to rely on those standards, it should, therefore, be forced to come forward and show them. That is the sole difference now in both design and warning cases in New Jersey, between a negligence case and a strict liability case. The point is that both plaintiffs' lawyers and defense lawyers are living with it, and we have active groups on both sides. Industry is living with it. I think there is really no substantial problem there. This is not absolute liability; strict liability does not even look toward absolute liability.

As I said, other areas that do not require some national view would be things like medical malpractice and the general tort law of the State. We are not looking, as any other State would not be

looking, to have our law governed from Washington; but in this area there is a need that only you can fulfill.

I would be glad to answer questions at the end of the panel and I thank you for the opportunity to address you.

Senator KASTEN. Thank you very much.

Our next witness is Michael Williams from the law firm of Johnson, Quinn, Clifton & Williams, Eugene, OR

Go ahead, Mr. Williams.

Mr. WILLIAMS. Thank you, Mr. Chairman, for the invitation to speak today. I will try to confine my remarks to just a few brief points.

First, let me address the point that the bill is supposedly fair and balanced. I agree with the goals of trying to achieve uniformity in product liability law and the goals of trying to reduce the costs, and delay involved in this complex litigation. This bill unfortunately does not codify current law. The Oregon legislature codified product liability law in 1977, and what it chose to codify was section 402(a), the restatement of torts. If this Congress would choose that standard, which is basically the standard which has been adopted by all the courts in this country, then it would be codifying current law.

I count 10 major changes in tort law that this bill would make, 9 of which favor business and one of which favors consumers, and I will just tick them off very rapidly.

Section 2.6 redefines harm to eliminate many types of claims.

Sections 5 and 6 eliminate strict liability for design and warning cases.

Section 2.9 creates a virtually insurmountable state-of-the-art defense, which is not available in most States now.

Section 8 reduces the liability of product sellers.

Section 5(b)(3) vastly broadens the scope of the definition of an unreasonably dangerous product, far beyond what comment k to the restatement of section 402A has done.

Section 9 reduces recoverable damages in comparative fault situations because it not only allows the damages to be reduced because of the fault of the claimant, but also because of the fault of any other party—not any other person not a party to the suit or any other cause. This is probably the most radical change in product liability law in the entire bill.

Section 10 eliminates the subrogation rights of employers and makes it far less economical then for plaintiffs' lawyers to be able to afford to bring these cases.

The high cost of product liability litigation is by and large the defense costs. Plaintiffs' lawyers are venture capitalists. They do not get paid until and unless a recovery is made, and there is no interest in the plaintiffs' bar of the delay or complexity. We would like to get the case to trial as soon as possible and get the case over.

Section 10 would make it more difficult to do that because plaintiffs will not be able to recover the cost of workers' compensation insurance.

Section 12 takes away the right to a jury on punitive damages.

And finally, the only one that makes a change in favor of plaintiffs is section 11, which has a very fair and reasonable statute of

limitations. That is one provision where Oregon law would be vastly improved.

Now, I want to take issue with Mr. Schwartz on the question of whether there really is a false standard currently in tort law in this country in product liability cases. I was trial counsel in a 4-month Dalkon Shield trial in Oregon that ended in March 1984, and the jury returned a verdict that the Robbins Co. was not negligent in that case in putting the Dalkon Shield on the market. Nevertheless, they found the product to be unreasonably dangerous, and several of the women made a recovery.

The problem in proving negligence in a products case arises because typically you do not get to trial in a case until 7 or 8 or even more years after the product has gone on the market. Meanwhile, technology has advanced and it is pretty easy for the manufacturer to show there is all kinds of new information available. And the control of that information is within the power of the manufacturer. They have the documents, they have the experts, and it is very expensive for the plaintiffs to try the conduct of the manufacturer instead of simply focusing on the design of the product.

The difference between strict liability in design cases and negligence standards that this bill would impose is whether you are trying the product itself or you are trying the conduct of the manufacturer. This bill would require plaintiffs now to try both, increasing the complexity and the cost of the litigation tremendously.

Finally, the worst provision of this bill is the comparative fault provision which would allow a manufacturer to reduce the award to a plaintiff because of ice on the highway or because a deer has run across the road or because an immune governmental body in some way contributed to the accident, and that is without question the most unfair provision in this bill.

Thank you very much.

[The statement follows:]

STATEMENT OF MICHAEL L. WILLIAMS, COUNSELOR, EUGENE, OR

The stated goals of the National Product Liability Act, (1) To achieve nation-wide uniformity and predictability in products liability cases, and (2) To reduce the costs and delays involved in such complex litigation, are laudible goals for Congress to work towards. Unfortunately, the current draft of the National Product Liability Act, S100, would fail to achieve the first goal, because it fails to provide for any single nationwide court who could achieve uniformity on interpretations of the Act, when at the same time the Act introduces several radically new concepts or phrases dealing with products liability law that will require years of litigation to clarify. The Bill also does nothing to achieve the second goal, because it will make most products liability litigation more complex and lengthier, due to the higher burden of proof required of plaintiffs who now must attack not only the product design but also the conduct of the manufacturer, and because it provides several new defenses and set-offs for the manufacturer that are not available in most states under current law.

Even if these goals were achievable with a re-drafted Bill, the provisions of the Bill constitute such a dramatic shift of the costs and burdens of injuries from manufacturers to injured persons or to employers of persons injured on the job, that it is also unacceptable from the standpoints of fairness and justice.

My comments will first highlight several of the major shortcomings of provisions in this version of the Bill, and then it will address a few of the shortcomings of the Bill for failure to address certain major problems in products liability litigation.

COMMENTS ON SPECIFIC PROVISIONS

The elimination of strict liability for product design defects and failures to warn will deprive many deserving claimants of fair compensation, and will remove a substantial incentive for manufacturers to conduct research and development on safety issues. Sections 5 and 6 of S100, in combination with the definition of "practical technological feasibiiity" in Section 2, constitute a radical departure from the common law and statutory law of products liability developed during the past twenty years in Oregon and other states by doing away with strict liability for product design and warning defects, and instead requiring a claimant to prove that the manufacturer knew or should have known of the dangers of the product, and had "available" a "developed" alternative to the product at the time of manufacture which was both "economically feasible" and "capable of use". This change from focusing on the design problems of the product to focusing on the negligence, if any, of the manufacturer at the time when the product was manufactured would mean in the coldest terms that many injured claimants would never recover. In broader social terms, it provides a strong incentive for an entire industry to avoid any sophisticated research and development on safety aspects of the product, because in many industries the only funds available for the research and development of newer and safer products are from the industry itself. Under this act, the industry is not penalized for failing to uncover that knowledge, unless some other source not only uncovers the knowledge but does the necessary development of the research knowledge to satisfy the test of "developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer." Who else is going to provide the funds necessary to uncover alternative and safer designs, if industry is not required to?

In many instances, products are on the market for a number of years, and cause injuries or disease which do not become apparent for a number of years after the sale of the product. A good example is the Dalkon Shield intrauterine device which was sold by the millions in this country from 1970 through 1974, and was not recalled by the manufacturer, despite thousands of injury claims resulting from its design, unitl 1984. In the ten years after the product was taken of the market, scientific and medical knowledge concerning the microbiological, plastics, and physiology of the interaction between a woman's body and the device advanced substantially, making it relatively easy now to provide that the Dalkon Shield was an unreasonably unsafe design. However, it is not at all easy to prove that in 1971, when the manufacturer put this IUD on the market, that all of this information was within the definition of "practical technological feasibility". Indeed, in the four month consolidated Dalkon Shield trail in Federal Court in Eugene that ended in March, 1984, the jury awarded three women who suffered emergency, life threatening surgeries and loss of fertility because of injuries caused by the design defects in the Dalkon Shield a substantial sum of money, but at the same time the jury found that the manufacturer of the Dalkon Shield, given the evidence permitted at that trail, was not negligent at the time of manufacture. Under S100, these women, found by a jury to be injury by a defective product, would not have been able to recover, and the manufacturer of the product would have been able to escape having the true social costs of its design defects placed on it. This is not fair, it is not justice, but it is the result that would be dictated under S100.

Under the Oregon law of products liability, the chief difference between strict liability for product defect and manufacturer negligence is that at the time of trail, the jury is allowed to consider all injuries caused by the design defect when deciding whether a manufacturer's product is unreasonably dangerous. The decision of the manufacturer to place the product on the market, under Oregon's strict liability test, requires an assumption that the manufacturer knew, at the time it placed the product in the stream of commerce, of all the subsequent injuries caused by the product, whether they were reasonably forseeable at the time of manufacture or not. This places the true cost of product defects on the manufacturer, and not on their random and subsequent victims, and it gives the manufacturer a strong incentive to monitor the number of injuries associated with this product and to conduct ongoing safety research and development. Under S100, the victims would bear the cost of these injuries, and the manufacturer would not have the incentive to do the research and development. It is a simple fact of economics that the entity best equipped to monitor the injuries associated with a product and to conduct the necessary research and development on alternative safety features of the product, is the manufacturer of the product itself. If the manufacturer's ignorance of problems to be caused by its product is rewarded by allowing the cost of injuries to fall on un-

aware and random victims, the social cost of injuries caused by products in this country will increase.

Reduction of the plaintiff's award by that percentage of responsibility attributed to non-parties and "all other causes" constitutes a radical and substantial shift of the costs of injuries from manufacturers to victims and their employer. Section 9 of S100 contains what is probably the most radical shift in the common law of recovery for injuries caused by product defects of any other provision in the Bill. Section 9(b)(1)(B) instructs the finder of fact to allocate a percentage of total responsibility for the injury "to any other cause or person who is not a party to the action (other than the claimant's employer or co-employee. . .)". This means, for example, that a governmental body immune from suit, or immune from a full share of damages (in Oregon state and local governments have a maximum liability even in a multiple injury accident of only $300,000 total). It also would allow the manufacture of an automobile with defective brakes to claim that the roadway design, smog conditions, ice on the highway, glare from a nearby window, and numerous other "contributing causes" should each have their percentage of responsibility allocated, and claimant's award would be reduced thereby. There are two chief problems with this provision. First, it is manifestly unfair in allowing the manufacture to escape paying the cost of an injury when claimant would not have been injured but for the product defect, and when claimant has not reasonable chance of making a recovery against these other "persons or causes". Secondly, it will create years of uncertainty in litigation over what constitutes a "other cause" or "person who is not a party to the action".

The definition of "harm" in S100 will prevent recovery by injured persons in many deserving cases. One of the inevitable problems in any codification of the common law is that the actual real-world situations of injuries are more complex and subtle than the language of the drafters of the Bill can capture. For example, persons injured by products can recover under S100 only if their injuries fall within the definition of "harm" in Section 2. To give two examples from our case files where recovery is currently permitted under Oregon law but would be barred by S100, consider the following: (a) a seven year old girl has her hand trapped in a meat grinder at her parent's restaurant, and is able to prove that the manufacturer of the meat grinder sold similar products in Europe that met stricter safety codes for length of funnel and diameter of funnel, which, had they been sold in this country where no regulations existed, would have prevented the amputation of her hand. The little girl clearly has a right to recover against the manufacturer of the meat grinder, even under the radically new provisions of S100. However, while her hand was still caught in the meat grinder and emergency personel were attempting to remove her from it, her mother returned to the resturant from a visit to her psychiatrist, because the mother was already undergoing psychiatric counseling for another problem. When this already emotionally fragile woman walked into the restaurant and heard her daughter screaming and saw her bloody hand, she collapsed and suffered a psychiatric relapse that took much treatment and many months to recover from. Because Oregon law allows her to recover for such injury, she achieved a substantial settlement short of trial from the manufacturer of the product. Under S100, she would have no right to recover at all because she did not suffer any "physical illness or injury". (b) A defective wiring box manufactured by a national company causes an electrical fire in tne home of an elderly couple and destroys completely four generations of heirlooms which have not much value in the market, but which have so much intrinsic value to the elderly couple that their lives are virtually destroyed, and they suffer severe depression till they die. Under S100 they would have at most the right to recover the market value of the personal property destroyed by the product defect, and be allowed no recovery at all for their emotional and personal injuries caused by destruction of their most treasured possessions. (c) A young couple purchases a new mobile home for $25,000, moves in, and soon becomes physically ill from high levels of toxic formaldehyde gas emanating from the particle board used in construction of the mobile home. Under S100, they would be allowed to recover their damages for the health effects of the toxic gas, but they would not be allowed to recover their $25,000 paid for the product, because S100 does not allow recovery for "physical damage to the product itself". Similarly, our office has represented many people who have purchased ureaformaldehyde foam insulation at a cost of several thousand dollars and had it placed in their home. It is not at all clear under S100 whether they could recover the cost of the foam itself, in addition to any physical injuries caused by the toxic emanation of formaldehyde gas. Instead, S100 relegates them to whatever remedies may be available to them under the Uniform Commercial Code, which may require all kinds of commercially technical notices, short statutes of limitation, limitations on damages, and other technical legal provisions which are prefectly acceptable in a commercial atmosphere were

parties on both sides can negotiate the terms of their commercial contract, but which do not make sense in a situation where a remote manufacture sells a toxic product to an uninformed consumer.

Elimination of the right to trial by jury for punitive damages provides protection to undeserving manufacturers, is undemocratic, and flies in the face of centuries of common law tradition. Contrary to some of the statements made by witnesses to earlier hearings on this Bill, it is not at all easy to achieve a punitive damage verdict from a jury in a products liability case. At most, a handful of such verdicts are returned each year, and any objective investigation of the facts underlying such award of punitive damages show the award was amply justified given the conduct of the particular manufacturer involved. In many instances, it is only the threat of punitive damages being awarded by juries that provides an incentive to manufacturers to stop manufacturing a particularly unsafe product, or to recall a product already taken off the shelves, but not recalled from users. A good example is the Dalkon Shield IUD, which, although it was taken off the market in 1974 continued to be used by hundreds of thousands of women in this country and elsewhere around the world on the recommendation of the manufacturer, despite the fact that jury after jury has found the IUD to be a defective and unreasonably dangerous device. It was the threat of continuing and higher and higher punitive damages awards against the manufacturer of the Dalkon Shield that finally caused the manufacturer to issue a recall of the product ten years after it had taken it off the market. The threat of excessive multiple punishment is not a serious threat. Under Oregon law, a manufacturer has a right to introduce evidence before the jury of any other punitive damages awards or criminal penalties it has already suffered, and the jury is instructed to take those into account. The issue here is: Do manufacturers trust the jury system to do justice? Eliminating the right to trial by jury may well be a violation of the Seventh Amendment to the United States Constitution, as well as bad economic and legal policy.

In *Byrd* v. *Blue Ridge Rural Electric Coop.*, 35 U.S. 525 (1958) the U.S. Supreme Court held that the allocation of fact finding between judge and jury was for the court holding the hearing to decide, not for state legislatures or Congress. Yet S. 100 would attempt to tell state trial courts how to allocate this function on punitive damages. Congress does not have the power to do this.

S100 radically broadens the defense of an unavoidably dangerous product by failing to require the manufacturer to warn of the dangerous aspect of a product, despite the fact that Comment k to Section 402A of the restatement (second) of torts does so require. The concept of an "unavoidably unsafe" product was first codified in Comment k to Section 402A. The examples given were prescription drugs or vaccines which had unavoidable side effects in some small percentage of users, but which were clearly necessary to prevent widespread communicable disease, such as polio. The version of Comment k which has been included in S100 is radically different. It apparently is meant to apply to any product whatsoever, not just those highly experimental drugs and vaccines which are needed to prevent communicable disease; it does not require the manufacturer to warn of the unavoidable danger of the product, which removes the element of informed consent which is present in Comment k; it allows the manufacturer to escape liability if any safety modification would impair the effectiveness of the product to any degree, not just to an unreasonable degree. I suggest at the least that the word "unreasonably" be inserted in Section 5(b)(3)(B) before the word "impairing". In addition, the manufacturer should not be allowed to escape liability for an unavoidably dangerous product unless it has taken all reasonable steps in terms of scientific and technical research and development to make sure that the risk is irreducible. S100 does not require such research and development work first before allowing this defense to a manufacturer of a dangerous product.

The statute of limitations provisions in S100 are good ones but need clarification regarding service of the complaint. One of the few ways in which S100 would improve the rights of consumers and victims of products in the State of Oregon is in its more reasonable and fairer statute of limitations. Oregon currently has an eight year statute of ultimate repose for products liability actions that cuts off all rights of a victim to seek damages eight years after the product was first sold for use or consumption, regardless of whether the product causes a latent disease not detectable within eight years, regardless of whether the product is intended for use for more than eight years, and regardless of when the victim discovers his or her injury. S100 would make a vast improvement in Oregon law on this score. However, one area not touched upon by S100 that will cause confusion and non-uniformity throughout the country is the limitation on service of the defendants after filing a complaint. In California, for example, a claimant has three years following the

filing of a complaint to serve a defendant. In Oregon, a claimant has only 60 days after the statute of limitations runs. Since S100 is silent on this aspect of the commencement of an action, the courts will either develop a national common law of service, or they will look to the individual state laws. If they look to the individual state laws, then uniformity will not have been achieved.

The act should require product manufacturers to monitor and keep records on product-related injuries. If society's interest in reducing the number of serious injuries caused by products is to be realized by this act, then manufacturers should be required by law to maintain a monitoring service and recordkeeping function involving all potentially product-related injuries. The best possible point at which to monitor the injuries relating to any specific product is at the manufacturer, who is most likely to hear about injuries caused by the product anywhere in the world, or at least is far more likely to hear about such injuries than is a single claimant, or even a governmental agency. This would not be a great expense to the manufacturer, consisting primarily of simply having a file that contains all complaints or notices of injury relating to a product. I am not suggesting that the act should require the manufacturer to investigate these injuries, as it should be judged on a continuing negligence standard as to whether the cost of investigation was justified in a particular instance.

The act should contain some incentives for reducing litigation cost and delay. Many states have adopted pre-judgment interest as one means of providing an incentive to manufacturers and their insurers to dispose rapidly of claims, and fairly settle those legitimate product-related injury claims. Interest is computed at the state's legal rate from either the date of injury or date of filing of the complaint, rather than from the date of ultimate judgment. This removes the current incentive caused by high interest rates for manufacturers and insurers to delay as long as possible the trial of the large products liability case. Since S.100 is silent on this provision of some state's laws, it is not clear whether the existing pre-judgment interest laws would be pre-empted by S.100. Whether they are or not, in the interest of uniformity, S.100 should impose pre-judgment interest on all persons found liable under it.

The elimination of subrogation rights on behalf of employers and their worker's compensation insurers is unwise and economically inefficient. One of the primary justifications for products liability law in the first place is the economic efficiency argument: To the extent possible, the cost of injuries caused by products should be placed on the manufacturer of those products, so that the manufacturers have the strongest possible incentive to reduce those costs through research and development on safety features or on decisions not to market dangerous products, or from combinations of design changes and adequate warnings. Section 10 of S100 would change the current status of the economic efficiency of products liability law by forbidding employers or their worker's compensation insurers who pay substantial sums of money to an injured victim, from recovering the costs of the injury from the truly responsible party, the manufacturer of the defective product. Basically, S100 simply shifts the cost of the worker's compensation system in products cases from the manufacturer to the employer or its insurer. To the extent the shift exists, it removes the incentive on a manufacturer to do research and development, and it allows the manufacturer to make its calculation of "prudence" in selling a product that it knows that will cause a certain number of injuries to exclude the cost of those injuries that will be borne by the worker's compensation system. This will result overall in the increase of the number of injuries, as well as a shift of the cost in covering those injuries from manufacturers to employers.

In several areas of intersection of products liability law with other state law, this bill will create greater disuniformity and confusion. Oregon does not have pure comparative negligence, while this bill does. What happens when an injured victim sues the driver of the car that caused the accident, as well as the manufacturer of defective brakes? The latter would be covered by pure comparative fault, the former by Oregon's modified comparative fault (if plaintiff's fault exceeds 50%, plaintiff recovers nothing), and the jury will be hopelessly confused.

Another example: Oregon abandoned the ambiguous notion of "proximate cause" several years ago by separating it into two separate analyses: (1) Scope of manufacturer's duty; (2) Whether the product defect was a substantial contributing factor (cause in fact). How are Oregon courts to interpret "proximate cause" in the case above, where a defendant driver is subject to Oregon law on causation and duty, and the product manufacturer is subject to a "proximate cause" analysis. Again, only jury confusion and judicial disuniformity can result.

CONCLUDING REMARKS

The primary problems which the proponents of S100 claim to want to solve with this Bill are (1) the lack of uniformity in products liability law throughout the country, and the consequent lack of predictability on the part of the manufacturer of its future liability, and (2) the high cost and lengthy delays involved in products liability litigation. Both of these are laudable goals, but unfortunately S100 does not achieve either of them. The primary achievement of S100 would be to shift substantially the cost of injuries caused by defective products away from manufacturers and sellers of those products and onto the random victims and employers of victims of those dangerous products. In shifting the costs of injuries caused by defective products away from the manufacturer who is in the best possible position to do the research and development and monitoring necessary to reduce such costs, this Bill would actually lead to an increase in the number of serious injuries caused by products, and would increase the social cost of defective products across the country, when the full cost of lost work time, medical bills, and human suffering is added up.

The uniformity promised by the proponents of the Bill would not be achieved for two main reasons. First, the Bill introduces several new phrases or concepts into the law of products liability that will require years of complex litigation to clarify, and the bill provides no mechanism for achieving uniformity of interpretation at the national level. Only if the United States Supreme Court were to take numerous products liability cases involving all the new points of law contained in the Bill would we finally even have a hope of achieving uniformity promised by the Bill. The proponents would be better off seeking the establishment of a special national court made up of either selected Federal Appeals Court judges or selected State Supreme Court judges, which could pass at the national level on ambiguities in the language of the Bill, or conflicts in its interpretation among the various state and federal courts who will hear cases tried under the Bill. Second, the Bill will cause great differences in analyses and results when a products case goes to trial with a medical malpractice or driver negligence case, as frequently happens. Then, differing state laws on comparative fault, proximate cause, allocation of fact finding between court and jury, will result in persistent and unavoidable disuniformity in products law.

Rather than reducing litigation costs and delays in products liability cases, this Bill would increase them because of the uncertainties due to the new phrases and concepts, and because there is not additional incentive to dispose of cases earlier in the litigation process than they are now disposed of. In short, this Bill would benefit neither society as a whole, nor consumers and victims of dangerous products in general, and would gain nothing except a reduction in the responsibility of manufacturers of dangerous products for their consequences, thus leading to economic efficiency, subsidized by the imposition on the random victims of dangerous products of most of the costs of their own injuries. I urge the committee either to reject the Bill, or to modify it substantially in light of the above shortcomings, before reporting it to the Senate floor.

Mr. KASTEN. The next witness is Mr. Gene Kimmelman, who is the Legislative Director of the Consumer Federation of America.

Mr. Kimmelman?

Mr. KIMMELMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, my name is Gene Kimmelman. I am Legislative Director of the Consumer Federation of America, and I am here today representing not only the Consumer Federation of America, but Consumers Union, public citizen, and the U.S. Public Interest Research Group, who have all joined in the written statement that we are submitting for the record.

We appreciate this opportunity to testify before you today on S. 100, the Product Liability Act.

Unfortunately, from our vantage point, S. 100 is an inappropriate solution to a nonproblem. Now, there is a problem in product liability; it is a real problem. It is a problem that is also affecting interstate commerce, and that real problem is inadequate compensation for consumers who out of no fault of their own are injured by dangerous products.

On any one day at any one point in time in this country, there are over 50 million people who lack adequate or any health insurance. If injured using a product, they have no assurance that their needs will be met unless we maintain strong product liability laws. If anything needs to be done to improve our current system, it is not to weaken standards on manufacturer responsibility, but it is to build some form of comprehensive social insurance network into the safety inducing mechanisms that currently exist in product liability law so that those who lack health or other insurance are protected.

Besides not responding to this real problem in product liability, S. 100 would severely damage consumer protections built into many State laws. The bill would impede recovery for injuries caused by dangerous products, reduce incentives to make products safer, and add costly confusion to the product liability litigation process.

While our written statement addresses the many flaws we see in the bill, at this point I would like to focus on the main problem we have with S. 100. The most anticonsumer provision of this bill is its replacement of State strict liability standards with an inflexible, narrow negligence standard for design, defect, and failure to warn cases. The bill would preempt the very strict liability standards of State law that have made it possible for more and more consumers to recovery for injuries caused by dangerous products.

Now, the key in strict liability is not its precise formulation, not its precise definition, but its focus on the inherent disadvantages individuals have in challenging a manufacturer in court for injuries caused by a dangerous product.

What makes strict liability fair is that it requires the injured person to prove no more than is reasonable under the circumstances. The analysis focuses on the condition of the product, whether it was unreasonably dangerous, and whether that product caused the injury.

Why is this so important? What makes it better than the negligence standard? After all, viewed in isolation, negligence may sound very reasonable. The answer is that in the real world, negligence often doesn't work. Just think about the process of trying to prove negligence. The important thing to remember is that the information needed to show what a manufacturer knew or should have known, how else the product could have been designed, what other tests should have been done, what everybody else in the industry knew about the product dangers, all this information consumers usually cannot get their hands on, or it is information that manufacturers control.

The key is who must prove what. If negligence is the standard, consumers must prove too much. Consumers must prove what may in fact be true, that a manufacturer was negligent, but what they cannot get the information to demonstrate. That is the problem with any negligence standard, and the particular problem is even worse in this legislation.

S. 100's negligence standard would function more as an obstacle course to thwart recovery by injured consumers. First, the consumer must prove negligence, but the standard for what is considered unreasonable behavior is based on what other manufacturers

do, an industry standard, not a standard based upon consumer expectatations. So, from a manufacturer's point of view, there is no need to try to make products any safer than most other companies do. To prove negligence, the consumer must show that the manufacturer acted in a way that other reasonable manufacturers would not have acted.

So much for a fair burden of proof, and so much for product safety.

Second, the bill's negligence standard narrows the analysis of manufacturer conduct, focusing on particular dangers that cause an injury. So even if manufacturers knew about other dangers of their products that would have required pulling them from the market or improving them, injured individuals may not recover because that manufacturer did not know about this specific danger.

Third, even when negligence is established, manufacturers have a second, third, and fourth shot at the apple through defenses that put greater emphasis on profit maximization than product safety. These defenses do nothing but chip away at an already inappropriate negligence standard.

And finally, an injured consumer's award may be reduced by anything from foreseeable modification of a product to acts of God, ice, snow, and rain.

When all is said and done, Mr. Chairman, the only thing that is certain about this bill, the only uniformity to it is that consumers injured by dangerous products will be less likely to receive compensation for their injuries.

As we have written in our statement, such changes in law would weaken incentives for product safety and add costly confusion.

In conclusion, Mr. Chairman, I can only say that consumers' interests cannot be served by legislation that abandons the strict liability standard and flexibility which State tort law developed.

Thank you.

[The statement follows:]

STATEMENT OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

I. INTRODUCTION

Mr. Chairman and members of the committee, I am Gene Kimmelman, Legislative Director of the Consumer Federation of America [CFA]. I am here today representing CFA,[1] Consumers Union,[2] Public Citizen's Congress Watch[3] and U.S.

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[1] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports*, its other publications, and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with approximately 3 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

Public Interest Research Group [4] to express our opposition to S. 100, the "Product Liability Act."

In addition to the numerous concerns our organizations have expressed about this legislation is the past (see Appendices A, B and C) we join together today to emphasize S. 100's most anticonsumer provisions.

Contrary to its stated goals, S. 100 would impede recovery for injuries caused by defective products, reduce incentives to manufacture safe products, and add costly confusion to product liability litigation. This legislation would replace state statutes and common law with a federal, fault-based scheme that wipes out essential consumer protections now embodied in product liability law.

II. STRICT LIABILITY

State product liability law has evolved to protect consumers, injured by defective products. Over time, courts noted that by placing goods on the market, the maker represents to the public that these products are suitable and safe for use.

As our economy moved from a system of small-scale production—with personal relationships dominating the interaction among workers, managers, distributors, sellers and consumers—to an impersonal, highly mechanized, mass production and distribution system, courts devised new legal rules to promote product safety. These rules, as stated more than 20 years ago in *Greenman* v. *Yuba Power Products*, 59 Cal. 2d, 57, 63 (1963) "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."

Although states formulate their rules in slightly different fashions, the law in 46 states currently protects injured consumers through a strict liability legal standard.(1) Under these laws, manufacturers who produce defective products are held responsible for the injuries they cause.

Strict liability is not shorthand for the carte blanche payment of meritless claims; it is not absolute liability. It is folly to suggest that under strict liability theory, a consumer simply walks into court claiming injury and is then awarded a check for compensation. Rather, strict liability subjects the injured consumer to rigorous but fair proof requirements. Injured consumers must prove by a preponderance of the evidence that the product was defective; that the defect in the product rendered it unreasonably dangerous; and that the defective product caused their injuries.

The focal point of strict liability analysis is appropriately placed on the product's condition instead of the manufacturer's conduct. Thus, injured consumers are not required to prove what only the manufacturer can know—the "state of mind" of the corporation.

Manufacturers have a wealth of technological and financial resources from which to draw upon in a product liability lawsuit. Strict liability enables injured consumers to pursue their claims on a more level playing field.

III. NEGLIGENCE

Rather than preserve strict liability and spread its protective blanket, S. 100 would replace it with a negligence standard in cases challenging the design of a product, or the failure of a manufacturer to warn consumers about product dangers (sections 5 and 6). To prove negligence, injured consumers would be required to demonstrate that their injuries were caused by unreasonably dangerous products, that manufacturers knew or should have known about the specific dangers, and that reasonably prudent manufacturers would not have made the product, used the design, (section 5(b)(1)(a) and (b)) or warned of the danger (section 6(b)(1) and (2)).

(A) S. 100's negligence standard

The negligence standard, as set out in S. 100, would tilt the competitive balance in product liability litigation in favor of manufacturers. Even where negligence is present, it is often difficult if not impossible to prove because manufacturers control evidence about what they knew, when they knew it, and how they responded once they knew. It is precisely because this information is so difficult for injured consumers to find that courts moved from a negligence to a strict liability standard in design defect cases. *See Smith* v. *Smith*, 278 N.W. 155, 160 (S.D. 1979).(2)

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[4] U.S. Public Interest Research Group is a national, nonprofit, nonpartisan, research and advocacy organization. The group serves as the Washington, D.C. lobbying office for state PIRG's across the country.

In addition, the bill's narrow definition of negligence would reduce manufacturers' responsibility for dangerous products. Once a determination is made that the consumer's injuries are caused by a particular product, which is itself difficult to demonstrate,(3) how should the court then analyze the manufacturer's conduct? Rather than include consumers' expectations or an objective balancing of product risk and utility as is done under strict liability, S. 100's negligence test would limit manufacturer responsibility to instances where "a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design." (Section 5(b)(1)(B)).

Obviously, the only "person in the same or similar circumstances" is another manufacturer. This formulation of reasonableness would preclude recovery for injuries caused by a design which, though dangerous and capable of improvement, most manufacturers use. For example, contrary to current law, S. 100 would absolve an automobile manufacturer from liability for injuries caused when the automatic transmission in its cars slipped from "park" to "reverse," because other manufacturers use a similarly defective design. *Lenhardt* v. *Ford Motor Company*, 683 P2d 1097 (Wash. 1984). In the *Lenhardt* case, the court applied strict standards of liability and ruled that the conduct of other manufacturers within the same industry was irrelevant. Accordingly, the plaintiff obtained compensation.

Finally, this negligence test would favor manufacturers by confining court analysis to the specific product danger that caused injury. Under S. 100, manufacturers are only liable if they "knew . . . or should have known about the danger which allegedly caused the claimant's harm." (Section 5(b)(1)(A)). Manufacturers who are aware of some, but not all product dangers and negligently fail to eliminate or warn about any of them, would only be liable for injuries caused by the known dangers. Even though the product should not have been marketed, consumers injured by the undiscovered, rather than the known dangers, would not recover. Such a result is contrary to current law and unfair to consumers:

"[W]e would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken. . . . the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation . . ."

Petition of Kinsman Transit Co. . . . (Kinsman No. 1) 338. F2d 708 (1964).

(B) Destruction of documents

S. 100's negligence standard would exacerbate existing problems of proof caused by corporate destruction of documents. To keep vital information away from claimants, it is not unusual for manufacturers to destroy or withhold evidence in product liability lawsuits.(4) The bill's negligence standard would require injured consumers to determine what may only be shown through documents no longer in existence.

Document destruction has been institutionalized into such innocuous sounding programs as "preventive maintenance" or "law compliance," and may include a "document retention schedule" to eliminate "misleading, improvident or erroneous" documents for the purpose of optimizing the corporation's position in the event of litigation.(5)

Because of such practices, the bill's negligence standard would frustrate the just resolution of product liability claims. Without essential documents, claimants would have to proceed to trial lacking the primary evidence necessary to show negligence. This would either prolong the litigation, adding substantial costs, or deter the filing of meritorious claims.

The recent disclosure that an attorney destroyed documents concerning corporate knowledge about a defect in the Dalkon Shield birth control device is a case in point. To date, more than 11,000 women have filed suit against the A.H. Robins Company for shield related injuries consisting of pelvic inflammatory disease, sterilization, or death.(6)

Since the early 1970's, the company consistently claimed it made available all relevant documentation. Then last year, Roger Tuttle, an attorney for Robins, testified that he was ordered by the company's general counsel to destroy hundreds of documents relating to the safety of the device. He testified that the papers concerned matters such as the officials' knowledge of the defect, the lack of premarket testing, and flawed labeling of the product.(7)

This evidence is key to a finding of negligence, but would not be necessary if the focus of the litigation were on the condition of the product. In one of the largest Dalkon Shield cases ever brought to trial, the jury found no negligence, but ruled for the injured consumers on a strict liability theory. *Pamela van Duyn* v. *A.H. Robins,* Civil No. 79-801 (D. Ore. March 1, 1984). Therefore, if strict liability for design defects is abolished, as S. 100 proposes, these women, whose injuries deprived them of the ability to have children, would not receive compensation from the manufacturer.

The Robins example is not an isolated instance. In one of the worst DC-10 air crash disasters, where 271 people died, it was discovered that in-house counsel for American Airlines had instructed its senior safety director to destroy his notes, memoranda and other underlying data gathered at his investigation of the crash, and deliver only one final copy of his report to an airline senior vice president. The airline's vice president discarded this copy.

American Airlines did not reveal that the report had been destroyed until, after one year of continuous requests, the court ordered it to do so. The airline defended its refusal to reveal the existence and destruction of this report by arguing that the destruction occurred before the time plaintiffs asked for the documents. The reports might have shown that the airline knew of a crack in the engine bulkhead before the crash but failed to repair it. *(See In re Air Crash Disaster near Chicago Ill., on May 25, 1979,* 90 FDR 613 (N.D. Ill. 1981).

Document destruction is not the only tactic employed to avert liability and prolong litigation. Manufacturers also take advantage of the lawyer-client privilege to aviod or delay disclosing information about product dangers.(8)

These examples illustrate that consumers injured by defective products are running an uphill race to obtain compensation. It is unfair to eliminate the strict liability legal standard in cases challenging product design or warning.

(C) Defenses

Even when plaintiffs prove negligence, S. 100 provides three broad defenses that would protect manufacturers from liability. If manufacturers can show that, despite their negligent behavior, the products' dangers were an "inherent characteristic," or means to eliminate the dangers were not within "practical technological feasibility," or the products were "unavoidably dangerous," they would avert liability. (Section 5(b) (2) and (3)).

As defined in the bill, these defenses all favor manufacturers by emphasizing profit maximization over product safety. The inherent characteristic defense would shield manufactuers from liability where safety devices known to prevent injuries were left off a product whose dangers "would be recognized by the ordinary person who uses or consumes the product." This defense would bar recovery where the blade of a fan, which could have been enclosed in a metal casing, severed the plaintiff's arm.

The technological feasibility defense would protect manufacturers where safer designs are available and easy to implement but are not "economically feasible for use." Under this defense a plaintiff who was run over by an outboard motor which lacked a safety switch not commonly used or commercially marketed would recover nothing.

The unavoidably dangerous defense would shield manufacturers from liability where products could be made safer but not "without impairing the effectiveness of the products' intended and ordinary use." This defense would bar recovery where the manufacturer failed to attach a safety guard to its chain saw which, despite impairing the saw's maneuverability, would have prevented the plaintiff's injury.

(D) Comparative fault

In addition, the bill would restrict recovery of damages based on any conduct or event outside manufacturers' immediate control or expectations. Injured consumers' recovery would be reduced or eliminated where the misuse, alteration and modification of products by users is foreseeable but not "reasonably anticipated" by manufacturers (Section 9 (c) and (d)(1); where, acting reasonably under the circumstances, people voluntarily used a dangerous product—for example, by following an employer's instruction to operate dangerous machinery (section a(e)(2)); and where "other causes"—including natural conditions like ice, snow and rain—contributed to cause the injuries.

IV. PRODUCT SAFETY

The product liability system provides incentives for manufacturers to devote resources to product safety. A recent study by the Rand corporation concluded, "growing corporate awareness of product liability issues spurred in several instances by suits that resulted in substantial individual judgments against firms increased the willingness of these organizations to establish formal product safety activities." (9)

The Rand Study found that of all the various external social pressures, product liability has the greatest influence on product design decisions. Other influences, like governmental regulation, are of secondary importance and work through product liability lawsuits to promote safety.(10)

Yet S. 100's emphasis on industry standards, pro-manufacturer defenses, and limitations on punitive damages would send the wrong message to manufacturers who are clearly in the best position to reduce the total cost and number of product injuries.

Under S. 100's negligence test, the central issue is whether a reasonably prudent manufacturer knew or should have known about the condition of the product. Therefore, if all manufacturers in a particular industry use a cancer causing substance, such a design decision might be considered reasonably prudent. What then would encourage the industry to investigate substitute ingredients? If manufacturers fail to research safer designs for a product, no information would be available during litigation to show that a safety feature was possible or within practical technological feasibility.

Moreover, under S. 100, manufacturers would simply not be encouraged to test products for safety, since doing so might provide the information needed to show knowledge of the defect and expose the manufacturer to potential liability.

The following example demonstrates S. 100's potentially damaging effect on incentives for safe product manufacture. Normal use of power rotary lawnmowers involves many dangers that even the most careful consumer cannot avoid. Occasionally, trimmings that clog the balde must be removed, a water hose, rock or branch must be moved from the lawnmower's path, and steep terrain or slick grass cuttings will propel the lawnmower off its course or cause someone to fall into the machine's path.

The best way to reduce these dangers would be through a safety device that desengaged the blade when the operator's hands were off the handle—a "dead man's switch." Such a safety device would decrease the likelihood that even unreasonable consumer behavior—like unclogging the blade area of a running mower or picking up the lawnmower to trim a hedge—would lead to dangerous injuries.

S. 100's numerous defenses—each of which, standing alone can exonerate negligent conduct combined with restrictions on recovery would weaken if not eliminate the economic incentive for manufacturers to add a "dead man's switch" to their lawnmowers. After all, under the bill,

"Lawnmowers are probably 'unavoidably dangerous' and a safety switch that disengages the blade unless both hands press firmly against the handle might 'impair the effectiveness of the product's intended and ordinary use' (e.g., the machine would constantly require restarting, or children would not be strong enough to operate the lawnmower), enabling manufacturers who fail to install the switch to avert liability under section 5(b)(2)(B) and (3)(B); or

"Since the sharp blade is an 'inherent characteristic' of the power lawnmower, manufacturers who fail to install the switch could escape liability under section 5(B)(2)(c) so long as the blade's dangers 'would be recognized by the ordinary person who uses or consumers the product;' or

"If too costly to market or wasteful of gasoline because of constant restarting, the switch may not be 'within practical technological feasibility,' allowing manufacturers who fail to install the switch to avert liability under section 5(b)(2)(A) because the switch is not economically feasible for use (section 2(9)); and

"Even if manufacturers are found liable for failure to add the safety switch, their financial responsibility may be reduced by consumers' 'misuse, alteration or modification' of the lawnmowers (section 9(e)(d)) or their 'negligence, contributory negligence or assumption of the risk' (section 9(e)), or 'other causes' (section 9(6)(1)(B) such as slippery conditions caused by the moisture of the grass."

By restricting manufacturer liability through these narrowly focused escape hatches, S. 100 would discourage product improvement for the benefit of all consum-

ers, due to the difficulty and cost of forseeing specific risks incurred by few consumers.[5]

S. 100's punitive damage provisions would also reduce manufacturers' incentives to improve product safety. These provisions would increase plaintiff's burden of proof making it more difficult for consumers to obtain such recoveries. (Section 12(a)(1)). Additionally, S. 100 would establish a separate trial procedure for compensatory and punitive damages, thereby increasing legal fees and delays in obtaining the award.

Punitive awards in a product liability context are an important tool for curbing outrageous and reckless disregard for the health and safety of consumers. They are not awarded after a mere showing that a manufacturer should have known about a product defect, yet failed to investigate adequately. Rather, punitive damages are awarded where the manufacturer knew its product would harm consumers, yet affirmatively chose to put profit over safety.(11)

Punitive damage awards are rare and do not account for a major share of large awards. In fact less than 1 percent of awards in claims greater than $100,000 include punitive damages.(12)

V. UNIFORMITY AND TRANSACTION COSTS

S. 100 would replace state product liability law with a complicated federal statute. Despite its proponents' assertions, the bill would neither create a uniform product liability system, nor reduce transaction costs.

(A) Jurisdiction

Although S. 100 preempts state law, state courts would be free to interpret its provisions as they wish, regardless of lower federal court interpretations. The only rulings binding upon state courts would be U.S. Supreme Court decisions. *U.S. ex rel. Lawrence* v. *Woods*, 432 F.2nd 1072, 1075–1076 (7th Cir. 1970).(13)

Yet since S. 100 is federal law, federal courts interpreting it, in situations where there is diversity of jurisdiction, would not be bound by state court rulings. *Maternally Yours* v. *Your Maternity Shop*, 234 F.2d 538, 540–541, n.1 (2d Cir. 1956).(14) Under this "unusual if not unique"(15) jurisdictional rule, it is unrealistic to expect that one uniform interpretation of a complex statute will naturally emerge from independent state and federal court rulings throughout the nation.

(B) Confusion

S. 100 would only add uncertainty and confusion to the law of product liability. It abandons terms like "forseeable," that are clearly defined under state law, in favor of new terms like "practical technological feasibility" and "reasonably anticipated conduct." (Sections 2(9), 2(14)).

S. 100's definitions of these new terms are so obtuse that they almost invite litigation. For example, "practical technological feasibility" is defined as:

"The technical, medical, and scientific knowledge relating to the safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product and economically feasible for use by a manufacturer; (Section 2(9))."

The bill defines "reasonably anticipated conduct" as

"The conduct which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." (Section 2(14)).

It is impossible to predict how the many courts that are not familiar with these terms will interpret them.

S. 100's toxic tort provision (Section 3(c)) is likely to spawn considerable litigation and cause massive confusion. Under one perfectly reasonable interpretation, S. 100 would not apply to product liability suits brought by people injured by toxic substances. Under another equally reasonable interpretation, S. 100 would be applied to such suits. Whatever the interpretation, individuals unwittingly exposed to toxic chemicals, like the recent occurrence in Bhopal, India, might be prevented from receiving compensatory relief. Given the enormous human and financial resources at stake in toxic tort cases, this section's vague language would be heavily litigated.

S. 100 would also create enormous confusion, and present insoluble conflicts, where an incident gave rise to both a product liability claim against one defendant and a common law negligence claim against another defendant. Consider, for exam-

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[5] Fortunately, the current product liability system forced lawnmower manufacturers to acknowledge the need for safety devices on their products. For history *See* 44 F.R. 10024, Feb. 15, 1979.

ple, a routine automobile accident. The liability of the car manufacturer would be determined under S. 100 but the liability of the driver would be determined under state law. Under state law, joint and several liability generally applies, but comparative responsibility may not; under S. 100 on the other hand, comparative responsibility applies but joint and several liability does not. What is a judge to do? S. 100 offers no solution.

(C) Legal fees

Proponents insist that S. 100 would reduce transaction costs. However, aside from limiting injured consumer's opportunities for compensation, there is no evidence that S. 100 would achieve this objective. S. 100 ignores the fact that defense lawyers fees are responsible for the significant majority of legal costs. Defense lawyers, unlike plaintiffs attorneys, are paid on an hourly basis, and thus have incentives to delay litigation. Such delay benefits manufacturers because the payment of awards is postponed indefinitely. For example, U.S. District Judge Miles Lord noted that by delaying the Dalkon Shield case, A.H. Robins earned enough interest on the payments at issue to cover its legal costs.(16)

(D) Uncertainty of the legal process

Due to inherent uncertainties in the legal system, predictability is virtually impossible. Two people may have factually identical cases against the same defendant, but because they are different people, and have different lawyers and because their cases are heard by different judges and juries, one may recover millions and the other may recover nothing at all. This is true under current law and would be equally true under S. 100.

S. 100 would shift the cost of product related injuries to Medicaid, Social Security, and other government programs. Accordingly, the cost to the manufacurer of such injuries would be reduced, thereby raising the cost of those injuries on everyone else.(17)

IV. CONCLUSION

The safety incentives in state product liability law far outweigh any inefficiencies that may result from the litigation process. Nonetheless, legitimate concerns about fair compensation for injuries caused by dangerous products make it appropriate to examine alternative systems with limited but certain compensation—like comprehensive social insurance. Unfortunately, S. 100 provides the worst of both the product liability and social insurance worlds: both more limited and less certain compensation.

To protect consumers, the flexible strict liability standard of state product liability law must be preserved. According to the Department of Health and Human Services, over 50 million Americans under age 65 lack adequate public or private health insurance.(18) These individuals need a strong product liability law to ensure that the manufacturers who profit by selling defective products compensate those who are injured by those products. S. 100 would, in the name of tort reform, create an obstacle course designed to prevent consumers injured by defective products from receiving compensation.

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9. *Designing Safer Products* at 15.
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12. *See* Alliance of American Insurers, *Highlights of Large Loss Product liability Claims,* 1980 p. i).
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15. Congressional Research Service, the Library of Congress, "Legal Analysis of the Product Liability Act" (S. 100 99th Congress) as introduced Feb. 12, 1985 at p.6.)
16. Remarks by Chief U.S. Dist. Judge Miles Lord, Minneapolis, Minn, Feb. 29, 1984 before 3 officers of A.H. Robins Company.
17. *See* J. Liebman and R. Sandy, *Can the Open and Obvious Danger Rule Co-exist with Strict Tort Product Liability?* 20 Am. Bus. L.J. 299, 360 (1982).
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Appendix A

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. Chairman and members of the Committee. I am David Greenberg, Legislative Director of Consumer Federation of America [CFA], a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 35 million people.

Our interest in the issue of product liability law is strong. Our board of directors and membership has selected the product liability issue as one of CFA's three top priorities for 1983.

Perhaps in explaining the importance of this issue to our members I should make some preliminary comments about what our interests are not. First, our interest is not to fatten the pocketbook of any group of lawyers, be they defense attorneys or plaintiffs attorneys. Like others on all sides of this issue, our members want to keep their legal bills as low as possible.

Second, we have no interest in harming businesses, large or small in any way. We do not believe that product liability law should be used as a tool for punishing business, forcing excessive or unjustified costs onto business or tying business up in massive litigation and insurance disputes. We realize that, ultimately, we foot the bill for product liability costs and we hope to work to make the system an efficient and forceful tool for safety.

For, Mr. Chairman, it is safety that lies at the base of our concern. We seek a system of product liability laws that promotes safety—first and foremost. Its primary focus should be to prevent product liability accidents and the suits that flow from those accidents. We take as axiomatic the notion that accident prevention is less costly, infinitely more sensible and simply more just than cost distribution after the fact. But when safety breaks down and people are injured by products, we of course do address the question of who should pay the costs inflicted by dangerous products: what is a fair result, given the parties involved; what is an efficient result, one that will minimize transactions costs; and what is the result that promotes product safety, one that provides incentives to stop the next death or serious injury before it occurs.

Given these twin goals—promoting safety and equitably distributing the costs when safety breaks down—how, then, do we view the standards of liability which currently exist among the various states? And how do those standards compare with the proposed negligence test for design and warning cases that forms the core of S. 44?

First, there is no doubt that the courts use a variety of tests that contain different words and, at times, different concepts. (Although there is some doubt in my mind that the tests really produce different results when they are applied to similar facts.) But, with the exception of a few states that apply negligence theory straightforwardly in design and warning cases, see, e.g., *Volkswagen of America* v. *Young,* 272 Md. 201, 321 A.2d 737 (1974), all the following tests are essentially strict liability tests:

1. The restatement second of torts Section 402A test.—Which imposes liability for injuries that are caused by a product "in a defective condition unreasonably dangerous." If the plaintiff meets this burden of proof, he or she has no burden of proving specific acts of negligence by the manufacturer. *Dippel* v. *Sciano.* 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

2. The consumer expectations test.—Which applies Section 402A in conjunction with comments I and G, two of the seventeen comments that follow Section 402A and are used by courts when applying the Section to specific facts. This test holds manufacturers liable for injury-causing product defects which make products more dangerous than the ordinary consumer with ordinary knowledge of its characteristics would expect. *Green* v. *Clark Equip. Co.,* 237 F.Supp. 427 (N.D. Ind. 1965); *Ginnis* v. *Mapes Hotel Corp.,* 86 Nev. 408, 470 P.2d 135 (1970); *Heaton* v. *Ford Motor Co.,* 248 Or. 467, 435 P.2d 806 (1967); *Vincer* v. *Esther Williams All-Aluminum Swimming Pool Co.,* 69 Wis. 2d 326, 230 N.W.2d 794 (1975). Again, plaintiffs need prove no negligence here; the focus of inquiry remains on the dangerous quality of the product defect.

3. The seller-oriented or imputed knowledge test.—Under which manufacturers are held liable for defective products which a reasonable seller would not have sold had it known of their harmful character. *Welch* v. *Outboard Marine Corp.,* 481 F.2d 252, 254 (5th Cir. 1973); *Phillips* v. *Kimwood Mach. Co.,* 269 Or. 485, 491, 525 P.2d 1033, 1036 (1974). This test does not require manufacturers to know about design defects or to be negligent in failing to uncover them. Instead, the test imputes knowledge of the dangerous defect, removing a key inquiry under a negligence standard.

4. The risk-utility test.—Which holds manufacturers responsible for injuries caused by a foreseeable use or misuse of the product, if the trier of fact finds that a reasonably prudent product manufacturer would not have placed such a product into commerce after considering its hazards and utility as well as the ease of adopting an alternative safer design. *Cepeda* v. *Cumberland Engineering Co.,* 76 N.J. 152, 386 A.2d 816 (1978); *Micalle* v. *Miehle Co.,* 39 N.Y.2d 376, 348 N.E.2d 571 (1976). While the risk-utility test balances a variety of factors in determining liability—such as the usefulness of the product, the cost and availability of an alternative and the likelihood and seriousness of injury—it does not require an explicit consideration of whether the defendant acted negligently. Like the other tests, it allows courts and juries to focus attention on the condition of the product.

5. The California hybrid test.—Under which a manufacturer may be held liable for a design defect found inadequate using a consumer expectation test or a modified, burden-shifting risk-utility analysis. The latter alternative imposes liability when manufacturers cannot prove that a challenged design's benefits do not outweigh its risk of harm. *Barker* v. *Lull Engineering,* 20 Cal. 3d 412, 573 P.2d 443 (1978); *Caterpillar Tractor* v. *Beck,* 595 P.2d 871 (Alaska 1979). The *Barker* court shifted the burden of proof to manufacturers in recognition of the inherent disadvantage plaintiffs face in obtaining information in complicated design cases; only the manufacturer, it reasoned, knows most of the relevant factors to be weighed in a risk utility analysis.

The different tests—and the concepts contained within them—obviously create some potential for confusion, as courts proceed case-by-case and push on the boundaries of product liability law in order to dispense justice. But here is where we reach a point of overwhelming importance. Any confusion that exists in the law is there for one primary reason. Stripped to its essentials that reason is: To bring product liability law into sync with the modern era of technology and the rapid change in products, courts have been forced to explore difficult and unmapped legal terrain. They have been forced to deal with products that are stronger, faster, more powerful, more effective, and longer lasting. The sometimes miraculous benefits of these modern products bring with them sometimes frightening potential to cause harm in new and unforeseen ways. Familiar tort law concepts that work so well in simple situations do not apply straightforwardly to DES, asbestos, mass airline disasters and injuries from complex workplace machinery. Confronted with these new ways of causing harm, courts have responded in the only way possible—step by step, sometimes haltingly, sometimes mistakenly, but, nevertheless in a good faith effort to balance the competing needs of manufacturers, sellers, consumers, workers, bystanders and others. It is this process of modernizing product liability law that has created problems—not the adoption of any one theory, such as strict liability, and not the fact that the law is applied case-by-case by the courts of 50 states. We believe that any system—federal or state law, common law or statutory law—would have experienced and would continue to experience problems in dealing with the explosive changes like those foisted on the courts by new kinds of product injuries.

Strict liability was a necessary product of this more complicated set of problems. It has provided an important part of the solution rather than an additional problem. Recent survey evidence compiled by the Rand Corporation's Institute for Civil Justice casts strong doubt on the proposition that evolving standards of liability are to blame for product liability problems. A portion of the Rand Study on trends in jury trials examined every product liability case tried between 1959 and 1979 in Cook County Illinois, which includes Chicago. The results are surprising, at least to those who believe that new theories of liability pose a problem for our product liability system.

First, at the time of strict liability's greatest growth, the number of product liability trials increased only slightly—from 220 in 1970–74 to 234 in 1974–79.

Second, the overall success rate for product liability plaintiffs over the twenty-year period was among the lowest of the categories surveyed. They won 38% of product liability cases, second lowest to malpractice (where plaintiffs won 33%) out of the eleven categories. Apparently, the shift in standards of liability has not made it any easier for victims to win judgements.

Third, the most recent success rate for plaintiffs actually fell, from 41% in 1970–74 to 40% in 1975–79, indicating that the acceptance of strict liability and other doctrines may be more than offset by difficulties of proving harm and avoiding defenses in complicated product cases.

This evidence tends to confirm the conclusion of the Legal Contractor hired by the Federal Government's Interagency Task Force to survey product liability law and evaluate changes. The Legal Study's conclusion? "No doctrine or group of doctrines, even if changed immediately," could product a solution.

One reason that doctrinal change would not produce a solution is that current doctrine is essentially just. Despite many overreaching statements from proponents on both sides of the issue, the fact remains that the current trends in design and warning case law do not make manufacturers insurers, do not apply any notion of absolute liability, do not stray far from traditional tort law notions of fault.

First of all it is important to recall that whatever the strict liability label on Section 402A, its requirement that plaintiffs prove the existence of a defect that is "unreasonably dangerous" means that something with the product is seriously wrong. Serious wrong does not happen in many cases without wrongful conduct at some point—if we can use the term wrongful to encompass mistakes in judgement and lapses in the application of engineering or design theory to specific product problems. Thus, the core theory behind strict liability preserves the notion that negligence is present—but it simply does not require plaintiffs to prove it explicitly.

Second, moving beyond theory, respected commentators from Professor Wade to Professor Birnbaum to Trial Lawyer Harry Philo recognize that, in practice, strict liability cases resemble negligence cases in many respects. Whether plaintiffs have to meet a standard of unreasonably dangerous or use a risk utility analysis that balances risk of harm and seriousness of injury against the costs and benefits of an alternative design, their approach, quantum and type of proof and basic litigation strategy differ little from what they would employ in a negligence case.

This conclusion also emerges from a review of many of the cases that are accused of applying absolute liability. The leading case from California, *Barker* v. *Lull*, eschewed the notion of absolute liability and asked only that manufacturers be held liable for failing to prevent "excessive preventable dangers." 573 P.2d at 454 (Cal. 1978). And to those who believe that *Barker* went too far by eliminating the adverb "unreasonably" from the standard "unreasonably dangerous" and by shifting the burden of proof to defendants, Professor Wade has pointed out that the courts of California and other states have subsequently "nudged it back to a somewhat more central position . . ." Wade, "On Product Design Defects and Their Actionability," 33 *Vanderbilt Law Review* 551, 566 (1980).

An equally important point must be made about the recent *Beshada* case on asbestos exposure, another case attacked as applying absolute liability. Nearly all who have read *Beshada* indicate that the New Jersey Supreme Court went further in a doctrinal direction than necessary, since the facts of the case would have supported a recovery based on negligence theory. To the extent that other courts attempt to use *Beshada* as precedent without facts which show clear wrongdoing, it is unlikely that they will get very far.

The general point should be clear. Strict liability design and warning cases—as they are applied—do not stray far from concepts of negligence and wrongful conduct. But what these major trends in strict liability cases do provide is protection that victims will not have to prove knowledge explicitly because such proof is often difficult or impossible. Instead, the cases allow for the dangerous product to stand as a surrogate for dangerous conduct when necessary.

We believe that this protection is necessary right now and that it will be increasingly necessary in the future. Each day we learn more and more about the hazardous results of long-term exposure to chemicals in the workplace. Each day we learn more and more about the unknown and unintended side effects of potent drugs. Each day we learn more and more about the unforeseeable consequences of what we genuinely believed at the time were competent designs of everything from industrial machinery to automobiles to upholstered furniture. What happens in the future, when the unknown and the unknowable produces massive injuries to workers, to women, to children?

When all is said and done, under S. 44, victims would bear all the costs of these dangerous product failures. We believe such a result is unjust, uneconomic and unbalanced.

The proponents and drafters of S. 44 have spoken a great deal about its fairness and balance. But on this issue—the most important issue in the legislation—that balance is absent. What S. 44 says is this: when a product contains an unreasonably dangerous design or warning defect which could not have been known or discovered, there can be no liability, no matter how dangerous the product, no matter how severe the injury, no matter how great the total costs to society in lost lives, lost wages, and lost productivity.

Let me restate this problem in the simplest terms possible. Assume there are only two parties in a product liability case, the manufacturer and the injured person. The manufacturer places a product on the market that, despite the manufacturer's reasonable conduct, causes serious injury. We could say that the manufacturer is innocent in the sense that it has not been negligent or wrongful in any of its actions.

Certainly we can make the same statement about the injured person—he or she bought a product in good faith, used it properly and was injured. So, in a very real sense, we have two innocent parties. Yet, under the negligence standard of S. 44, only one of those parties—the victim—bears the entire cost of the dangerous product. CFA believes that that approach is far from balanced.

We also believe that approach is far from economic. Of the two parties, only one could have prevented the injury by undertaking more research and development—the manufacturer. And of the two parties, only one is able to purchase liability insurance to help defray the costs of product injury—the manufacturer. But liability is not imposed on this party. The costs of injury are not even shared by this party. Instead, the party without any ability to prevent or insure against injury bears the entire loss.

It is difficult for us to see how this approach promotes safety, economic efficiency or fairness. There is much more to be said about the specific concepts that form the negligence standard in S. 44—for example, "practical technological feasibility" and "knowledge reasonably accepted in the scientific, technical or medical community"—and the large burdens of proof it imposes on plaintiffs. But these issues are overwhelmed by the dangerous gap created by the general negligence standard. We believe it could leave thousands of consumers and workers injured by dangerous products without viable product liability claims. That result is simply not acceptable.

CFA thanks the Committee for the opportunity to testify.

Appendix—Public Citizen's Congress Watch

Our testimony has focused on perhaps the most fundamental flaw in S. 100—its requirement that the plaintiff prove negligence against the manufacturer in design defect cases. But the other major sections of S. 100, with one exception, are also intensely pro-defendant and anti-plaintiff. This paper briefly analyzes those sections and compares them with current law.

Analysis of S.100—Sections 8 through 14

1. Section 8.—Eliminates strict liability for nonmanufacturer sellers—e.g., wholesalers, retailers, distributors—in construction defect cases unless the manufacturer can't be reached. Eliminates strict liability for non-manufacturer sellers in design and failure to warn cases even if the manufacturer can't be reached

Section 8 would require the plaintiff to prove negligence even in construction defect cases[1] against non-manufacturer sellers—retailers, wholesalers, and distribu-

[1] Section 5 and 6 already require victims to prove negligence against all defendants in design and failure to warn cases.

tors—unless (1) the manufacturer can't be served or (2) "the court determines that the claimant would be unable to enforce a judgment against the manufacturer."

Under current law, on the other hand, as the Interagency Task force headed by Victor Schwartz pointed out in 1977:

"Most courts [have] extended strict liability to retailers and distributors, in part on the assumption that those groups would place pressure on the manufacturer to produce safe products. . . .Courts also believed that retailers and distributors might be more accessible to suit than manufacturers".[2]

See, e.g., Dunham v. *Vaughan and Bushnell*, 247 N.E.2d 401 (I11. 1969); *Vandermark* v. *Ford*, 391 P.2d 168 (Cal. 1964); Restatement (Second) of Torts, Sec. 402A, comment f.

Section 8 of the Kasten bill would bar recovery in construction defect cases where the plaintiff can prove that the product was defective when he bought it, but not that it was defective when it left the manufacturer's hands—for example, where a car or boiler explodes and the explosion destroys the evidence.[3]

In such cases, under current law, the plaintiff can recover from the retailer—since the defect was present when the retailer sold it and the retailer is strictly liable—and the retailer and the manufacturer then determine between themselves who pays what percentage of the damage. *Vandermark*, *supra*, 391 P.2d at 171. Under the Kasten bill, on the other hand, the victim can't recover from the manufacturer even under a strict liability standard because he can't prove the product was defective when it left the manufacturer's hands, and he can't recover from the retailer because he can't prove the retailer's negligence.

Moreover, while often preventing the plaintiff's recovery, Section 8 will not prevent the retailer from being sued. As Dean Wade—probably the nation's leading torts authority—explained to the Consumer Subcommittee staff, "Plaintiff's attorney will still join the retailer, alleging negligence, thinking that the manufacturer may be able to prove that something happened to the product after it left him."[4]

Moreover, the court may determine that the planitiff can enforce a judgment against the manufacturer and then dismiss the retailer, but by the time the plaintiff obtains a judgment against the manufacturer the manufacturer may be bankrupt—and the plaintiff will therefore have no remedy.[5]

2. Section 9.—Severely undercuts joint and several liability

Section 9 would require the jury to answer interrogatories indicating "the percentage of total responsibility for each claimant's harm attributable to each claimant, each defendant, each third-party defendant, and to any other cause or person who is not a party to the action." § 9b1B. Each defendant is liable only "in accordance with its individual percentage of responsibility," unless it is "jointly and severally liable with another person," in which case the court shall enter judgment against the defendant "on the basis of joint and several liability." § 9g1. Joint and several liability is to be determined in accordance with applicable state law, "except that the basis for contribution shall be each joint tortfeasor's percentage of responsibility for the claimant's harm." § 9g.

While the language of this section is extremely unclear, plaintiff clearly would be unable to recover any amount attributable to other "causes" such as Acts of God, and would probably be unable to recover any amount attributable to bankrupt defendants or parties not before the court.[6] Under current law, in contrast, the plaintiff can get his full recovery from whichever defendant[s] he can recover from most easily, and the defendants then work out among themselves which ultimately pays how much. *E.g., Wiebe* v. *Seely*, 215 Ore. 331 (1959) ("Each is liable for the whole, and the injured party may pursue one separately, or he may pursue all jointly, or any number jointly less than the whole number"); *Richardson* v. *Volkswagenwerke*,

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[2] Interagency Task Force on Product Liability: Final Report, U.S. Dept. of Commerce, Washington, D.C., in Frumer & Friedman, Product Liability, App. G, at App-683 (1977) (hereinafter "Schwartz Task Force").

[3] *See* Hearings on S.44 Before the Subcommittee on the Consumer of the Committee on Commerce, Science and Transportation, 98th Cong., 1st Sess., at 63-64 (1983) (Statement of University of Texas Law School Professor W. Page Keeton) (hereinafter "1983 Hearings").

[4] Notes on Suggested Changes in S.2631 [S.100's predecessor in the 97th Congress], by John Wade, Professor of Law, Vanderbilt University, Reporter, Restatement (Second) of Torts, in Consumer Subcommittee files (1982).

[5] Hearing on S. 44 Before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 2d Sess., at 492 (March 5, 1984) (Statement of Hofstra University Professor Aaron Twerski) (hereinafter "1984 Hearings").

[6] 1984 Hearings at 493-94 (Statement of Hofstra University Professor Aaron Twerski); 1984 Hearings at 457 (Statement of American University Professor Andrew Popper).

A.G., 552 F.Supp. 73 (W.D. Mo. 1982). As the California Supreme Court has explained, the joint and several liability rule:

"Frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such case the rule recognizes that fairness dictates that the wronged party should not be deprived of his right of redress, but that the wrongdoers should be left to work out between themselves any apportionment." *American Motorcycle Assoc.* v. *Superior Court*, 578 P.2d 899, 901 (Cal. 1978).

In addition, by requiring courts to apply comparative fault rules mathematically, section 9 severely restricts what Victor Schwartz has called the courts' "equity powers to provide for a fair and just result." Schwartz, Comparative Negligence (Supp. 1981) at 99, *citing Cline* v. *Sawyer*, 600 P.2d 725 (Wyo. 1979); *Daly* v. *General Motors Corp.*, 575 P.2d 1162 (Cal. 1978). *See also Day* v. *General Motors Corp.*, N.D. Supreme Court No. 10519 (Feb. 2, 1984).

3. Sections 2(14), 9c-f.—Expand the affirmative defenses—misuse, alteration or modification, contributory negligence and assumption of risk, superseding cause

Under these sections, the plaintiff's recovery will be reduced or barred if he used or altered the product in a manner that was not "expected, ordinary and familiar," even if use or alteration in that manner was foreseeable. In addition, the plaintiff's contributory negligence or assumption of risk will reduce or bar his recovery whether or not he was aware of the danger or acted reasonably in encountering it. And a third party's negligence may be a "superseding cause" and thus bar the plaintiff's recovery against the defendant.

CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

Comment n to section 402A of the Restatement carefully distinguishes between two types of contributory negligence: (1) "a failure to discover a defect in the product or to guard against the possibility of its existence," and (2) "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk." S.100 expands the application of the first kind of contributory negligence, and expands the definition of the second kind.

ORDINARY CONTRIBUTORY NEGLIGENCE

Prior to the general acceptance of comparative negligence, courts generally did not allow the Restatement's first type of contributory negligence—ordinary contributory negligence—to affect the plaintiff's recovery in strict liability cases. Under comparative negligence, courts do allow the Restatement's second kind of contributory negligence—the kind generally known as assumption of risk—to reduce the plaintiff's recovery. Many states do not, however, allow ordinary contributory negligence to reduce the plaintiff's recovery.[7] Such conduct should not reduce recovery, as Professor Twerski has noted, because "the very aspect which made the product dangerous and defective in the first instance [may] result in the very harm which one could expect from the defective design." Along the same line, Victor Schwartz gives the following example:

"If defendant has violated a statute that was intended to protect plaintiff and others similarly situated from the very risk that befell him (for example, a child injured by a weapon that defendant sold him in violation of law) plaintiff's contributory negligence will be ignored by the law."[8]

It would not be ignored, on the other hand, by S.100.

ASSUMPTION OF RISK

The Restatement's second kind of contributory negligence—assumption of risk—requires that the plaintiff know of the danger and voluntarily and unreasonably encounter it. *Accord*, Schwartz Task Force at App.-705. This type of conduct does—and should—reduce the plaintiff's recovery.

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[7] *E.g.*, Lewis v. Timco, Inc., 697 F.2d 1252 (5th Cir. 1983); *Austin* v. *Raybestos-Manhattan*, Maine Sup. Jud. Ct. #3408 (Jan. 17, 1984); *Star Furniture Co.* v. *Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982); *Suter* v. *San Angelo Foundry and Machine Co.*, 406 A.2d 140 (N.J. 1979); *Smith* v. *Smith*, 278 N.W.2d 155 (S.D. 1979).

[8] Schwartz, Comparative Negligence, at 5 (1974).

Under the Kasten bill's definition of assumption of the risk, on the other hand, the plaintiff's actions can be completely reasonable yet his recovery can still be reduced or barred. The drafters of the Model Uniform Product Liability Act [UPLA] have suggested that this is unfair to the plaintiff. Model Uniform Product Liability Act, 44 Fed. Reg. 62738 (1979).

Similarly, Dean Wade, the principal drafter of the Uniform Comparative Fault Act, has emphasized that reasonable assumption of the risk is simply "not intended to be included within the [Uniform Comparative Fault] Act." [9] Dean Wade gives the following example:

"Suppose a father sees his child about to be run over by defendant's speeding car. He dashed out into the street and pushes the child aside but is himself hit and injured. He saved the child's life at the deliberate risk of his own body, but his conduct may have found to be reasonable under the circumstances. If so, he was not at fault and his conduct should not affect the measure of his recovery."[10]

In *Eckert* v. *Long Island Ry. Co.*, 43 N.Y. 502 (1871), similar conduct by the plaintiff did not affect his recovery, nor would such conduct affect recovery under the UCFA. Under the Kasten bill, on the other hand, recovery would be reduced and could be barred.

The Kasten bill's expansion of assumption of risk would have a particularly severe effect on injured workers. For example, under current law an employee who works on or around a dangerous piece of equipment while under a direct command from his employer has not acted unreasonably and thus has not assumed the risk of being harmed by the equipment. *See, e.g., Merced* v. *Auto Pak Co.*, 533 F.2d 71, 80 (2d Cir. 1976). Under the Kasten bill, on the other hand, a manufacturer can argue that the employee assumed the risk, since he voluntarily—though not unreasonably—encountered the danger. *See also Rhoads* v. *Service Machine Co.*, 329 F.Supp, 367, 380-381 (E.D. Ark. 1971) (employee's hand and arm crushed by punch press); *Bartkewick* v. *Billinger*, 247 A.2d 603 (Pa. 1968) (plaintiff injured while reaching into glass-breaking machine to prevent jamming while employer was operating machine); *Inouye* v. *Pacific Gas & Electric Co.*, 348 P.2d 208, 211 (Cal. 1960) (employee electrocuted when aluminum pole touched negligently maintained electric wires); *Hedding* v. *Pearson*, 173 P.2d 382 (Ct. App. Cal. 1946) (truck ran over plaintiff's legs while plaintiff, pursuant to foreman's direction, was welding plate in driveway).

SUPERSEDING CAUSE

Section 9f would allow "product misuse, alteration or modification . . . or other acts or omissions by the claimant's employer or co-employee" to be a superseding cause of the claimant's harm and thus to bar his recovery. The drafters of UPLA, on the other hand, expressly made a similar section of UPLA optional because of their reluctance to "create a situation in which a claimant injured by a defective product cannot bring a successful suit against anyone."[11] The drafters of UPLA emphasized that "this could occur when the subsection shields the seller of the defective product, and an immunity (e.g., worker compensation) shields the negligent third-party actor."[12]

The superseding cause section of S. 100 is even broader than the superseding cause section of UPLA: section 112B2 of UPLA allows only the voluntary, unreasonable use or storage by the third party of the product causing the injury to bar the plaintiff's recovery, whereas S. 100 would allow acts, omissions, misuse, and alteration or modification by the third party to bar the plaintiff's recovery.

4. Section 10.—Reduces recovery in third party suits by injured workers

In third party suits by injured workers, Section 10 reduces the plaintiff's award against the third party by the amount attributable to other "causes" such as Acts of God, and probably by the amount attributable to bankrupt defendants and to parties not before the court. § 10a, § 9b.

The plaintiff's recovery is also reduced by the amount the court or jury determines the plaintiff "is or would be entitled" to in a workmen's compensation proceeding. Thus, the jury in the product liability case must determine the amount of workmen's compensation benefits the plaintiff would receive in the workmen's compensation proceeding. In effect, the compensation case would be tried once in the

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[9] Wade, Products Liability and Plaintiff's Fault—The UCFA, 29 Mercer L. Rev. 373, 383 (1979).

[10] *Id.*

[11] 44 Fed. Reg. at 62738.

[12] *Id.*

products case, and then again in the compensation case, although the amount the jury "awards" as workmen's compensation is not admissible in the compensation case. This provision of the bill would enormously increase transaction costs. Moreover, because of the enormous practical difficulties involved in having a jury "award" workmen's compensation benefits, this provision as a practical matter could force injured workers to exhaust their administrative remedies before filing a product liability suit.

Ironically, the drafters of S. 100 seek to federalize product liability law but not workers compensation law. In contrast, the drafters of UPLA believed that "the development of Worker Compensation as a sole source of recovery in product-related workplace accidents would be the best solution to the problem [of inequities between the workers compensation system and tort system], but only if the worker received additional benefits in the course of overall Worker Compensation reform." 44 Fed. Reg. at 62740. To federalize and restrict product liability law under S. 100 without reforming workers compensation is both inconsistent and inequitable.

5. Section 11.—Prohibits suits by people injured by defectively designed capital goods more than 25 years old

Section 11 prohibits suits by people injured by capital goods more than 25 years old if the product causing the injury was defectively designed or lacked an adequate warning.[13] Thus, if the Kasten bill were the law, a person injured today by an exploding boiler made in 1961 could sue the manufacturer but someone injured by one built in 1959 could not.

Because of its arbitrary pre-injury cut-off of the right to sue, section 12 is probably unconstitutional. The courts of five states have expressly held that recently-enacted statutes of repose for product liability suits violate state constitutional provisions prohibiting the deprivation of property—i.e., the right to seek redress for injury—without due process. *See Kennedy* v. *Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984); *Heath* v. *Sears Roebuck*, 123 N.H. 512 (1983); *Lackford* v. *Sullivan*, 416 So.2d 996 (Ala. 1982); *Bollick* v. *American Barmag Corp.*, 284 S.E.2d 188 (N.C. Ct. App. 1981), *modified and affirmed*, 293 S.E.2d 415 (N.C. 1982); *Battilla* v. *Allis Chalmers Mfg. Corp.*, 392 S.2d 874 (Fla. 1981). Three federal courts have upheld state statues of repose against state constitutional attacks. *Barwick* v. *Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984); *Pitts* v. *Unarco Industries*, 712 F.2d 276 (7th Cir. 1983); *Hawkins* v. *D & J Press Co.*, 527 F.Supp. 386 (E.D. Tenn. 1981). However, state courts need not follow these interpretations. *United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *cf. Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64 (1937).

Even if section 12 could withstand constitutional challenge, however, its limitation on liability is unjustified. Those who favor a nationwide statute of repose make three major arguments. First, they argue that any injury caused by an old product must have been caused by ordinary wear and tear rather than a defect in the product. But as the drafters of UPLA emphasized a few years ago, "prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe." 44 Fed. Reg. at 62732, *quoting Tucker* v. *Unit Crane and Shovel Corp.*, 256 Or. 318 (1970).

Second, some have argued that the lack of a statute of repose has caused product liability insurance rates to rise, since in setting rates insurance companies take account of injuries caused by products manufactured in prior years as well as in the policy year. The drafters of UPLA concluded in 1979, however, that "The limited available data show that insurers' apprehension above older products may be exaggerated," since 83.5% of injuries involving capital goods occur within ten years of the time the product was purchased. 44 Fed. Reg. at 62733. Moreover, the Rand Institute has recently found that "product liability claims will not become a significant cost to most manufacturers.[14]

Finally, some make a "two wrongs make a right" argument: that because some states already have statutes even more restrictive than the Kasten bill's, imposing the Kasten statute on all states would be a net gain for consumers. However, with the exception of Illinois, no large industrial state has enacted a statute of repose. In all, only 11 states have enacted statutes of repose that have not yet been held un-

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[13] The Kasten bill would permit suits against manufacturers who intentionally conceal the defective nature of their product for injuries caused by the cumulative effect of exposure to a defective product, or for injuries that were caused before but did not manifest themselves until after the 25-year period. Section 11(b).

[14] G. Eads and Reuter, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation, at xi (The Institute for Civil Justice, Rand Corporation, 1983).

constitutional; six others have established rebuttable presumptions that a product of more than a certain age has outlived its useful safe life and therefore is not defective.[15] The drafters of UPLA favored such a presumption. UPLA "does not attempt to apply fixed useful safe life standards for all products," they emphasized; "such an approach is not possible as a practical matter." 44 Fed. Reg. at 62733.

6. Section 12.—Increases the difficulty of obtaining punitive damages

Section 12 transfers the power to determine the amount of punitive damages from the jury to the judge, despite the belief of many Reagan Administration officials that such a transfer is unconstitutional. As Secretary of Commerce Malcolm Baldrige explained to the Cabinet Council on Commerce and Trade:

"The Task Force has recommended that the Administration not support the provision in the Kasten bill which would take from the jury the right to determine the amount of punitive damages.

"This recommendation is consistent with Administration policy, but it will displease some segments of the business community who distrust the ability of a jury to address fairly the issue of punitive damages. They have placed great importance on removing this issue from the jury.

"The Task Force has concluded that the proponents of this provision have not shown sufficient abuses to support this proposal. The role of the jury, as tempered by the authority of the judge to reduce the amount of any award, is made central to our judiciary system by the Seventh Amendment to the Constitution." [16]

Section 13 also requires the plaintiff to prove his punitive damages case by "clear and convincing" evidence. This standard would both increase the plaintiff's burden and create enormous confusion. The Kasten bill tells us that the level of proof required to satisfy the "clear and convincing" standard is "more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt," § 2(2), but it does not say how much less or more.

7. Section 13.—Suppresses evidence of post-accident product improvements

Under the traditional rule of evidence, as presently embodied in Rule 407 of the Federal Rules of Evidence, subsequent remedial measures are not admissible to prove liability but are admissible for other purposes, such as proving ownership, control or the feasibility of precautionary measures.[17] Thus, the evidence typically gets to the jury, but the judge instructs the jury not to consider it on the issue of liability. The rationale is that manufacturers would be less likely to correct known product defects if they knew those corrections could be used against them in a lawsuit.

In recent years, however, the trend—although not yet the majority rule—has been to admit such evidence on the issue of liability, for at least three reasons.[18] First, such evidence is logically relevant; the manufacturer would make the change only if he thought it would make his product safer. Second, the doctrine of "limited admissibility" has always been regarded with skepticism; the jury may well consider evidence of subsequent repairs on the issue of liability notwithstanding the court's limiting instructions. Third, even manufacturers themselves admit that "if a design change needs to be made, we make it." [19] A rational manufacturer is not going to avoid fixing a defective product that would likely result in future lawsuits solely because evidence of the improvement may be admitted in pending lawsuits.

The Kasten bill would prohibit the admission of subsequent repairs to prove liability, thus preventing the modern trend from becoming the majority rule. In addition, it would overrule even the current majority rule of "limited admissibility" by prohibiting the admission of subsequent repairs to prove anything. And finally, it would not even allow such evidence to be used for impeachment purposes unless the defendant "has expressly denied the feasibility" of making repairs or offers evidence

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[15] Hearings before the Subcommittee for Consumers on S. 2631, 97th Cong., 2nd Sess., at 255–57 (1982) (Statement of William D. Ford, Coalition for Uniform Product Liability Law, Appendix D.).

[16] Memorandum from Secretary of Commerce Malcolm Baldrige to Members of the Cabinet Council on Commerce and Trade, Sept. 3, 1982.

[17] *E.g., Bailey* v. *Kawasaki Kisen*, 455 F.2d 392 (5th Cir. 1972); *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961); *Steele* v. *Wiedemann Mach. Co.*, 280 F.2d 380 (3rd Cir. 1960).

[18] *E.g., Farmer* v. *Paccar*, 562 F.2d 518 (8th Cir. 1977); *Robbins* v. *Farmer's Union Grain Terminal*, 522 F.2d 788 (8th Cir. 1977); *Ault* v. *Int'l Harvester Co.*, 177 Cal. Rptr. 812 (1974); *Caprara* v. *Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981).

[19] 1983 Hearings at 167 (Statement of Ivan Brand, Vermeer Corporation).

of subsequent repairs in defense of a punitive damages claim.[20] Thus, section 13 would give the defendant absolute power to keep evidence of subsequent repairs away from the jury.

8. Section 14.—Statute of limitations

This section would require people injured by defective products to bring suit within two years of the time they discovered or should have discovered the harm and its cause. This section is not unfair. While the large majority of states have statutes which are at least as favorable to the plaintiff as this statute, a handful of others have statutes that begin to run from the time of exposure and which therefore may bar a claim before the plaintiff learns of it. These clearly unconscionable statutes are rapidly falling by the wayside, however. *See, e.g., White* v. *Johns-Manville Corp.*, Wash. Sup. Ct. No. 50772-4, 13 BNA Prod. Safety & Liab. Rptr. 79 (Feb. 1, 1985); *Hanebuth* v. *Bell Helicopter International*, Alaska Sup. Ct. No. 2893, 13 BNA Prod. Safety & Liab. Rptr. 64 (Jan. 25, 1985); *Bendix Corp.* v. *Stagg*, Del. Sup. Ct. No. 28, 1984, 13 BNA Prod. Safety & Liab. Rptr. 13 (Jan. 4, 1985). *But see Fleishman* v. *Eli Lilly*, 62 N.Y.2d 888 (1984).

Senator KASTEN. Mr. Kimmelman, thank you very much.

Mr. Schwartz, we have heard critics, and this morning we have heard them also say repeatedly that Senate bill 100 would not reduce confusion or create a uniform product liability system. The criticism appears to rest on, I think, two propositions: First, that State and Federal courts will interpret Senate bill 100 differently, State by State by State, court by court by court; and the second is that many of the legal terms contained in the bill are new, and as such, will be subject to extensive litigation in terms of trying to define or redefine the terms.

What is your view of these two arguments?

Mr. SCHWARTZ. Under a Supreme Court case back in 1943 called *Dice* v. *Akron Railroad*, the Supreme Court said when a law of this type is being interpreted, the State courts must look to the Federal courts for guidance. There are only 11 Federal circuits. They will provide guidance.

The words of this bill have been tailored and retailored, defined and redefined to make them explicit. When we are debating this bill, we rarely have debates over what the bill says; we have debates over whether we think the bill is correct or not. It is rare that we get into word quibbles here at these hearings.

The bill's terms probably have had more polish than any other tort law product, including the restatement of torts sections. So I think it is unlikely that you are going to have these ambiguities. I think that that is usually an argument that is made as a cover for other disagreements with the fundamental purposes of the bill.

Senator KASTEN. I wonder, Mr. Schwartz, if you could respond to Mr. Williams. He went through a list of different points. I am particularly interested in your comments with regard to the state-of-the-art defense and the allocation of responsibility, which is, I believe, section 9 of the bill, which Mr. Williams emphasized.

Mr. SCHWARTZ. Well, two lawyers are going to differ about this. The use of the word "practical technological feasibility" in the bill is one that is subscribed to by the overwhelming majority of States, and Judge Dreier might be a person who, as he said, is here "on his own ticket," so to speak. He might want to address that, too.

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[20] The Kasten bill restricts the admissibility of subsequent remedial measures when admissibility would benefit the victim (Section 14(a)), but expands the admissibility of such measures when admissibility would benefit the manufacturer (Section 13(d)).

There is practically no State that does not let you show that at the time you made the product, there was simply no way you could know or have reason to know of an injury.

With respect to the comparative fault provision, frankly, I am surprised by Mr. Williams statement. Over the many years here, this is a provision that most people have praised. It has been praised by scholars of the topic of comparative fault.

With respect to the part of the bill that troubled Mr. Williams, these, as the committee report shows, is directed to acts of God: No defendant has been held responsible for unforeseeable acts of God, and damages can be reduced in that respect.

He may have been suggesting that the bill somehow abolishes joint and civil liability, but after a long debate, as you know, Mr. Chairman, a specific provision was put in the bill leaving joint and several liability fully and completely to the States.

I think one problem a person might have when they read this bill initially is they focus on one particular section and they do not read the others. I think after reading the bill as a whole, people might have a different view of it.

But I would like to cede a moment to Judge Dreier on this because he is somebody who is in court and has to interpret statute every day.

Senator KASTEN. Judge Dreier?

Mr. DREIER. Thank you.

Senator KASTEN. Would you please speak into the microphone?

Mr. DREIER. As to the practical technological feasibility standard, this was one of the elements in the risk-utility analysis, in fact, one of the primary elements that went back as far as the 1960's. I think the article was written by then Dean Wade. It is a standard that is applied.

We went beyond it, as you know. Beshada said we do not care whether you could have known about it, you are still responsible for it. That lasted a year.

We now very strongly say that the practical technological feasibility is to be applied, and it is to be applied as of the time the product went on the market.

Now, as you may have read in my comments, one of the problems I have with it, I do not believe that section 2.9 used the correct time at which you apply this standard. You applied it very early in the process, when the product was manufactured, not when it was shipped. It could have sat in the dealer's inventory for a year. I think you might want to use your own standard that you apply in section 11(a)(1). But putting that aside, that is the fine tuning. The use of that standard is one that is well known in the law, has very definite parameters, and one that I do not think you will have a problem with in the courts of the country.

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. The comparative responsibility under section 9, Judge Dreier, should that be left to State law, from your experience?

Mr. DREIER. Well, I first thought that we might want to do it, and I put it in my presentation. The reason I did say this—and I still lean toward it—it is not one of the strongest points I have, but I still do lean toward it—because the State laws have to be applied

in a multicause of action litigations setting, where someone may have a negligence, a nuisance, a product liability, and maybe two other claims, all rolled into a suit. To pull the one cause of action out and say that we are going to impose a different standard does create a problem to a jury.

Now, as a judge I could charge different standards, and when I was on the trial level, I did. We had the multiple situations, some of the Jones Act or early tort claims act cases and some others, where you did have a multiple standard. The juries got hopelessly confused. My suggestion is that by leaving it to State law in that area, you will back away from that confusion.

Senator HOLLINGS. Very good.

Mr. Schwartz, you cited the *Dice* case, and of course, that was that the Federal question is to be determined by Federal law rather than State law, not the Federal interpretation of the State law.

Now, the more recent case of *Lawrence* v. *Wood,* is that not the case where they found, since there is no appeal from the State tribunals to the lower Federal courts, that the lower Federal courts would not interpret the Federal statute, but rather, it would be at the State level?

Wherein in S. 100 do you find, as you phrased it, I believe, that they would look to the Federal courts for guidelines? Where is the provision in S. 100 that would provide that?

Mr. SCHWARTZ. Well, the S. 100 does not have to have such a provision because that has been, with due respect, sir, a uniform interpretation by the Supreme Court. The Supreme Court in Dice was looking to an FELA case that arose in the state courts under state law where the state courts were interpreting a Federal law, that is written with great similarity to S. 100. There was no provision in the FELA as to where courts should look for guidance.

The Supreme Court held and indicated in that case and in all subsequent cases that when you have a Federal law interpreted by our State courts, the state courts are to look to high Federal courts for guidance.

In the beginning of this country there were no lower Federal courts, but there were Federal laws, and as the Hart and Wechsler text that is used at all our great law schools points out on this issue, in some 20 or 30 pages—I would be pleased to submit them to the committee for their review and consideration, that State courts, when interpreting Federal law, are to look for guidance and interpretation to the Federal courts. That has been a consistent principle. It is in "Federal Courts and the Federal System" which is a standard text used at all American law schools.

Senator HOLLINGS. On the other hand, in the *Lawrence* v. *Wood* case, the court defines that the lower Federal courts exercise no appellate jurisdiction over the State tribunals, therefore decisions of the lower Federal courts are not conclusive on the State courts unless you provide for it in the bill.

Why do you not provide for it in the bill?

Mr. SCHWARTZ. We have no objection to providing it in the bill, but it is written Supreme Court law, and where the Supreme Court has spoken, it was not regarded as important, I think, by the

draftsmen to include provisions that restate fundamentals of what is currently the law of the Federal courts and the Federal system.

If there is a problem with that and people feel that it is necessary, it is an area that can be looked at to assure the result that the Supreme Court has already said time and again should obtain under a bill such as this.

Senator HOLLINGS. Mr. Kimmelman, do you want to comment?

Mr. KIMMELMAN. Well, Senator, I think this is an area of great confusion because you cite a case that really interprets the law very differently, and we have been looking for one consistent pattern and have not found it in the law. It is quite clear that the rulings of the U.S. Supreme Court would bind State rulings, but there is great unclarity in the law as to what happens in Federal district court rulings, and appellate court rulings.

Also, I am curious as to what the meaning of the word "guidance" that Mr. Schwartz uses is because it is one thing to be bound; it is another thing to seek guidance.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I want to pursue this point that Senator Hollings made earlier about clear and convincing evidence, and I would like to ask a question now.

Basically you are talking about the preponderance of the evidence standard or clear and convincing, or beyond a reasonable doubt.

Now, the clear and convincing standard applies only to punitive damages, as I understand it, in this bill. The lesser preponderance test is still the rule in compensatory damages under S. 100. But some States already require a higher burden of proof for punitive damages. For example, Colorado requires the criminal reasonable doubt standard for punitive damages.

So under present law, are not States such as Colorado, when a Colorado lawyer can bring a diversity action outside Colorado, are their States rights not being brutalized by the present system? In effect, is Colorado law not circumvented by forum shopping?

I will give that to anybody.

Judge?

Mr. DREIER. Yes, Senator, I think you might get that at the present time. You do get the forum shopping. As I said in my remarks, the number of New York cases that we get just because they want to obtain use of the discovery rule that we have across the river. Even North Carolina cases come up to us because of the absence of strict liability in North Carolina. In the last year we have had three of those just before my panel of the Appellate Division. You do get this forum shopping, and you can end this sort of practice.

The standards, the clear and convincing versus preponderance versus beyond a reasonable doubt are well known in the law, well defined in the law. They will not require new definition. They are contained in or referred to by both the Federal law and I know our own evidence rules. The use of them in a punitive damage situation where you have already fully compensated the plaintiff is something that should not be lost upon the people opposing the change. When you go to the question of punitive damages, the plaintiff has already been fully compensated. This is punishment of

the defendant, and to require a higher standard in a punishment situation certainly is not unknown in our law. Most punishments require a "beyond a reasonable doubt" standard. There is a lower standard than that here, and we find that by the use of the clear and convincing standard, it is brought home to the jury that they are imposing a punishment. I think it is entirely appropriate in this situation.

Senator PRESSLER. Mr. Schwartz, do you have any comment on that?

Mr. SCHWARTZ. No, other than the—when we drafted the Uniform Product Liability Act, this issue came up. Some people said that punitive damages was analogous to criminal punishment and a reasonable doubt standard should be used. Other people said preponderance of the evidence should be used.

There is, in the law, a middle standard that is used in fraud cases in common law, State courts today called clear and convincing, and we took a middle ground saying that if somebody was going to be punished, if you were going to go beyond compensating somebody, a higher standard of proof should be used, slightly higher.

It has been adopted in a few States, and there has been no trouble with its implementation as far as I know.

I just want to put in the record the case of *Local 174* v. *Lucas Flour,* 369 U.S. 95, which is the last time the Supreme Court has spoken on the subject of whether lower State courts have to follow Federal courts when interpreting Federal law. That decision was consistent with *Dice* v. *Akron.* The Supreme Court has not spoken on the subject since then.

Senator PRESSLER. Let me ask Mr. Kimmelman, really, the consumer groups are advocates of maybe 100 plaintiffs in the country who get exorbitant recoveries in this system, but all the other consumers in the country end up paying for it. I mean, those plaintiffs could still sue, and they would still get recovery, but I think the consumer groups have gotten themselves on the side of the trial lawyers and a very tiny handful of plaintiffs, I mean, percentagewise, who get exorbitant recoveries, but all the other consumers are paying for it.

How do you—you are abandoning 99 percent of the consumers.

Mr. KIMMELMAN. Senator Pressler, we are not abandoning them at all. We want to make sure that they have the appropriate rights to receive compensation when they are injured. We are not looking to the few people who get a lot of money, and it is a very few people. What we are looking to is the many people, and as I mentioned, the 50 million people out there who on any one day do not even have adequate health insurance and need to have alternative remedies, and they need to look to the law to find those.

I think it is important to remember when we look at this issue, we should not look too narrowly. It may be appropriate for everyone to pay a nickel more for products they purchase so that the few or many who are seriously injured and have hundreds of thousands of dollars in medical costs and other costs have a way of paying for their health care.

Senator PRESSLER. But those remedies would still be available under S. 100.

Mr. KIMMELMAN. We do not believe they would under this negligence standard. We do not believe it would be possible for many of those people to win their suits.

Senator PRESSLER. Judge, do you think they would be?

Mr. DREIER. I think they would, Senator, and I think you have to look at the proof required in design cases. I would like to see a couple of changes made there, and I go through it in detail in my written presentation, but I just thought I could bring home why the negligence standard is so close. You start off saying that in a design defect, that this product was designed improperly. It is not a manufacturing flaw where you can point to the broken widget or the weld that had gone. You look, however, at the design, what did the manufacturer do when this was designed?

You are forced to go back to the manufacturer and see whether the manufacturer acted reasonably. The test in a design defect case is: would a reasonable manufacturer have done this?

Well, what you are speaking about is basically a negligence standard, then. There is an excellent article written on this by one—I know somewhat on a conservative bent, but handled very well. In the Vanderbilt Law Review back in 1980, Dean Birnbaum from NYU wrote an article in which she said that we have gone from negligence to warranty to strict liability and then back to negligence, because in analyzing what you have, to do, of necessity you turn back because you have to look at what should the manufacturer have done when it designed this? Was it wrong? Was this a bad design? The only way you can tell that is to look at what a reasonable manufacturer would have done, and then of course, you have reached a negligence standard.

Senator KASTEN. Senator Gorton?

Senator GORTON. Judge Dreier, in reviewing your testimony, you take the framework of S. 100 as being a balanced framework and make a substantial number of suggestions for changes, some major, I am sure, some not so major.

How far along the line towards accepting the changes do you feel that we need to go in order to make this a valid approach?

Mr. DREIER. I was wondering when somebody was going to ask me that.

I said at the beginning that I did not give my expressions of agreement along the way because it just would have taken too much space. The vast majority of the act I agree with. I think it has gone far to both codify and protect rights, both consumers' and defendants'. There are I think some 25 changes that I suggest. I roughly count them, probably 15 to 18 favor plaintiffs and the balance to favor defendants, because noting the source of the act, I think some of the defendants' protections were built into it and later the plaintiffs' protections came in. But they are there. They are there on a strong basis.

I could go through them one at a time. We do not really have the time here with other people waiting. I think, however, that on balance, I would rather see this than nothing. I think some of the biggest changes, the ones that really bother me, such as the exclusion of commercial losses, such as the failure to remove responsibility in the area where you have an injured worker on the job who has no choice whether to use the machine or get fired, yet by using the

machine he is going to be hurt. You put his actions in that litigation. We could interpret the word "voluntarily" in there as excluding the employee situation, or stretch it out by putting a definition section in. That might save the section.

Taking a couple of these changes and putting them aside, saying I would really like to see those changes made, I could probably live with most of the bill as is. However, when I was asked to go through this, I did so on a section-by-section basis, again, not looking from plaintiff's or defendants' point of view, just looking at where I thought a change is needed to make this a good act. I want an act that will be easy to administer at both the trial or appellate level, understandable as to what the law is, and one that will be fair to both sides.

That is where my comments came from.

Senator GORTON Mr. Schwartz, if we were to accept every suggestion Judge Dreier makes, would you still want the bill?

Mr. SCHWARTZ. Well, as you know, with positions that are taken by the Product Liability Alliance, they are reviewed by a number of committees and people who have expertise, and I think that they would want to go through those suggestions and review them and make a decision about that. It is not a decision that I would want to make myself on the spur of the moment.

Senator GORTON. I appreciate your answer to that.

Mr. Kimmelman, is it your view that there should not be any changes in the law in this field at all?

Mr. KIMMELMAN. We are very concerned about the law in this area, and we are very intrigued by the proposal that you have presented in draft form, Senator Gorton. We are concerned that, just as Judge Dreier may have 25 problems with the Kasten bill, possibly it might be interesting to ask every other State supreme court judge what their concerns are. There may be a lot of overlapping ones. I suggest there may be a lot of different ones, which suggests to us, and from our own analysis as well, that there are major problems with the framework for this legislation, the way it approaches the problem.

That does not mean there are not other ways to address the problem that would be of less concern to us. We are worried about how much intervention there is in State law, we are worried about the confusion in the jurisdictional issue. We are worried mostly about fair recovery by as many consumers injured by defective products as possible.

We have not seen anything yet that on its face is the perfect solution to this. We believe it is appropriate to look more carefully at it, and we think there may be certain approaches that are a great improvement over this legislation.

Senator KASTEN. Mr. Kimmelman, why is that you do not seem to share Senator Pressler's concern that you have lost 99 percent of the consumers, and you are now representing 1 percent of the consumers, particularly those consumers who are trial lawyers? Why is it that you do not discuss and are not concerned from the point of view of consumers, about the transaction costs? Why is it that you are not concerned that we have a system in which a significant percentage of the dollars involved are going not to the injured consumers but to lawyers on one side or the other?

The system is inefficient, costly, costly to consumers, and you must be concerned about that issue if you are going to properly represent consumers.

Mr. KIMMELMAN. Senator Kasten, we are precisely concerned about that point, and our concern is so great that in our view, looking at transaction costs, what we truly would need is some sort of social insurance system to eliminate them all. If we are going to eliminate them, let us eliminate them. Let us make sure that people get what they deserve if they are injured.

What we are doing here, though, is making it more difficult for people to sue. We are not providing them any greater remedies. We are not providing them any greater certainty of recovery where they have legitimate claims. We do not believe that is appropriate for the vast number of consumers. And our concern is not at all that of trial attorneys. We want to make sure the money goes to the right people. As far as we can tell, most of it is being eaten up in defense costs.

Senator KASTEN. We have three additional panels, and we are running behind in time. We would like to ask Senator Pressler. Senator Pressler I know has one 30-second comment.

Senator PRESSLER. Yes. I shared this with Senator Riegle before he left the room. Senator Riegle recently bought a hot air balloon from my constituents at Raven Industries in Sioux Falls, and I told him that he should join us in supporting this bill so his next balloon will be 31 percent cheaper.

Senator KASTEN. Senator Hollings, do you have any additional comments or questions for this group?

Senator HOLLINGS. Mr. Kimmelman, where does the chairman get the idea that you are representing only 1 percent of the consumers? Is not your representation of the federation itself?

Mr. KIMMELMAN. Yes, it is, Senator Hollings.

Senator HOLLINGS. Right. I don't know of any better group. Name the groups again that you represent.

Mr. KIMMELMAN. I am here today speaking for Consumer Federation, Consumers Union, Public Citizen, and the United States Public Interest Research Group. And I might add, on the issue of States rights, which is an important issue, it is not just the rights of the State law, not just the rights of the State manufacturers, but it is the rights of the citizens of those States to fair compensation for injuries caused by defective products.

Senator PRESSLER. But what percentage of those groups are plaintiffs? What percentage of those groups you mentioned are plaintiffs?

Mr. KIMMELMAN. The groups themselves are not plaintiffs. There are members of the groups who could get injured just like you and I.

Senator PRESSLER. The point is they are such a tiny number, and they could still be plaintiffs; but it just seems to me that 99 percent of your membership are paying much higher fees for products, and I cannot see why you are on the side you are.

Mr. KIMMELMAN. Well, the higher fee for the product, Senator, provides a safer product and provides the right incentives for manufacturers to look carefully at the designs they use. We believe that consumers benefit.

Senator PRESSLER. But you do concede that the cost of products are much higher as a result, and this bill would not take away the right to sue.

Mr. KIMMELMAN. We concede that safety costs, and we think it should, and we think that those who are least careful should pay most.

Senator KASTEN. I would like to thank all the members of this panel. And I would like to just point out for the record that for one reason or another Susan Robson, who was to be a part of this panel, was unable to be here. She was to be included representing the National Women's Health Network, and she was unable to be here or did not come today.

Senator HOLLINGS. We are sorry that the witness for the National Women's Health Network was unable to be here today for personal reasons. The statement will be included in the record.[1]

Senator KASTEN. First of all, thank you very much for your testimony. Our next panel includes Mr. Ryan, Mr. Reynoldson, Mr. Banks, Mr. Teitz, Mr. Shapo, and Mr. Gold.

[Pause.]

The committee will come to order. Those people who desire to leave the room, please leave, and others be seated.

Our first witness on our second panel is the Honorable George Ryan, Lieutenant Governor of the State of Illinois.

Mr. Ryan.

STATEMENTS OF HON. GEORGE H. RYAN, LIEUTENANT GOVERNOR, STATE OF ILLINOIS; HON. W. WARD REYNOLDSON, CHIEF JUSTICE, IOWA STATE SUPREME COURT, PRESIDENT, CONFERENCE OF CHIEF JUSTICES; ROLAND BANKS, ATTORNEY; HON. JEFFREY J. TEITZ, STATE REPRESENTATIVE OF RHODE ISLAND, CHAIR, NCSL LAW AND JUSTICE COMMITTEE, NATIONAL CONFERENCE OF STATE LEGISLATORS; AND MARSHALL SHAPO, VOSE PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. RYAN. Thank you very much, Mr. Chairman. I have a cold today, and I hope you can bear with me. I will try and get through this.

I appreciate the opportunity to be here to testify this morning on S. 100, because I believe that the citizens of the United States, including manufacturers, retailers and consumers, can no longer tolerate the havoc caused by our current system of contradictory and unclear product liability rules in the States.

I am fully convinced that the enactment of product liability laws by individual States is completely ineffective. And we are all aware that in this day products are manufactured, transported and sold in many different States, and products are inextricably entwined in interstate commerce.

The product liability law in Illinois is not enough to help companies in Illinois, because their products must also comply with the rules in every other State in which they are sold or used. For example, a Chicago-based company is currently involved in a product

[1] See p. 202.

liability suit in Massachusetts involving a printing press built in 1914 which had subsequently been converted by its owner into a cardboard cutter. And this same company was forced to settle a New Jersey case involving a claimant who opened up a protective guard and reached into the machinery while it was still running.

Under New Jersey law, claimant or employee fault is not taken into consideration in establishing the liability. The manufacturing company is basically faced with two problems. First, they may be faced with conflicting rules of what they must do to make their product safe. And second, the current system has an adverse effect on product liability insurance.

Product liability insurance rates are set on a nationwide basis. And although Illinois may have rules that clearly define the limits of a company's liability, such as the Illinois statute of repose, Illinois companies must pay higher insurance rates because rules in other States may expand their liability. This is also reflected in the prices that Illinois consumers must pay.

I ask why should Illinois consumers, in a State with a responsible and balanced product liability law, pay an 18 percent product liability tax on a stepladder, as they must, because a handful of States let drunks who fall off ladders recover in product liaibility. Furthermore, the fact that rules vary from State to State make it difficult for insurance companies to predict liability which a company will face. This, too, raises insurance rates. These costs are added to the price of products, and the consumer ultimately pays for the current system.

One of my good friends in Illinois has been unable to obtain affordable product liability insurance for a small company that he has owned and operated, and he has been unable to obtain any insurance that he could afford since 1976.

I want to point out, Mr. Chairman, an important point here that the plaintiffs' bar has attempted, I think, to make a two-faced argument on the issue of statutory product liability and have argued against enactment of product liability legislation at the State level because it cannot provide stability or predictability that its proponents contend is necessary. Then the plaintiffs' bar in Washington, D.C. argues the product liability law is a problem that should be left to the State. It seems to me that they cannot have it both ways, and that the public should be more aware of that point, and it should be made.

I would like to make one last point, if I may, Mr. Chairman, and that is, the substantive rules in S. 100 are fair and are consistent with the rules applied by most courts today.

I thank you for the opportunity to be here. I will be glad to try and answer any questions.

[The statement follows:]

STATEMENT OF HON. GEORGE H. RYAN, LIEUTENANT GOVERNOR, STATE OF ILLINOIS

Good morning. I am George H. Ryan, Lieutenant Governor of the State of Illinois. I have come here today to testify in favor of S. 100, the Federal product liability law. Let me, briefly, share with you why I felt it was so important to come here and testify about this essential piece of legislation.

I first became familiar with product liability law when I served as minority leader and then speaker of the General Assembly of the State of Illinois. During my tenure in those offices, we enacted a statutory product liability law. It was hoped that the

law would bring about more stability in product liability law, reduce legal costs and increase predicatability for both the product seller and user alike. The law became effective September 24, 1979.

Unfortunately, the hopes that we had for this law did not fully materialize. While other states enacted product liability legislation, these statutes varied in many respects from our statute. Also, a number of other large industrial states failed to enact any legislation at all and simply left the matter up to caselaw.

Some have suggested before this committee that the inaction of large industrial states to implement product liability law was somehow an indication that no stability in the area of product liability was needed. I can testify, on the basis of personal experience, that this is simply not true. When product liability legislation is put forth at the state level, the organized plaintiffs' bar vigorously opposes it, and they make, in fact, a very persuasive argument. I heard it in Illinois and it goes like this.

The enactment of product liability legislation in a state cannot provide the stability or predicability that its proponents contend is necessary. The reason for this is that most goods, in Illinois over 70 percent, are shipped out of the state. Therefore, business in Illinois really needs guidance from laws in other states, not Illinois. Moreover, if the law should contain some restriction on consumers, such as a short statute of repose,[1] this restriction will adversely hurt the consumers in the state without providing any benefit to anyone. Let me expand on that a moment. Product liability insurance rates are set on a nationwide basis. Product liability costs are added to products, all products that are sold in interstate commerce.

For example, current data show that over 18 percent of the price of a stepladder incorporates the cost of product liability insurance. When citizens in Illinois buy such a ladder, they pay the 18 percent tax. In effect, they do not benefit from the fact that Illinois has a reasonably short statute of repose. They pay for the expanding and expensive tort rules in other states. What has happened is that product liability has become inextricably entwined with interstate commerce, and one state cannot solve the problem for either industry or consumers within its borders. Again, this, in effect, is the argument that was made by the plaintiffs' bar in the Illinois debate. Experience since 1979 has proved them correct. What I am surprised to learn, and one reason for my trip down here is that the plaintiffs' bar in Washington, D.C. contends that this is a problem that should be left to the states! They really should not be able, as the old saying goes, to have it "both ways". The truth, the practical truth, is that in the area of product liability law, Federal, uniform, product liability law is needed.

Let me share with you also that the Office of Lieutenant Governor of the State of Illinois is an active one—we are not simply standby equipment for the Governor. One of my responsibilities is to serve as Chairman of the Governor's Small Business Advisory Commission. In Illinois it is estimated that small firms will generate between 50 and 80 percent of all new jobs. During 1981 and 1982, small businesses produced a total of 2,650,000 jobs nationally, more than offsetting the 1,664,000 jobs lost by large business. The first step in promoting small business development is to identify concerns and needs of this important segment of the economy. Small businesses face many of the same problems facing larger businesses. Additionally, however, there are various impediments to economic growth that are peculiar to small and medium size businesses.

In that regard, it should be crystal clear that the product liability problem impacts small business more severely than large business. Pending now is a highly likely rise in the cost of product liability insurance. I can tell you, from personal experience, that small business will be hit much harder when this rise occurs. The tremendous instability in the product liability system, as has been testified to by witness after witness here, contributes to that cost. As S. 100 has recognized, by careful craftsmanship, there are many areas in product liability law where the role and cost of lawyers can be reduced without adversely affecting consumer rights. This occurs, for example, both in the section dealing with wholesalers and in the section dealing with workplace injuries under S. 100. Moreover, it is probably more difficult for small businesses than larger businesses to deal with 51 different sets of conflicting rules in this complex area. Small business is totally dependent on outside counsel for guidance. It is far more costly than having lawyers "on board" within your own plant or company.

Let me close on a note regarding fairness. I was very pleased to note, after my staff examined the issue, that S. 100, in general, is quite congruent with Illinois law.

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[1] Ours is 12 years from the date of first sale, or 10 years from the date of sale to the intitial actual user, whichever expires earlier.

Unlike the suggestions made by some witnesses here, it does not restrict or choke off consumer rights. In some key areas, the law is more favorable. For example, we have a 10 and 12-year statute of repose, whereas S. 100 has a 25-year statute. Also, S. 100's statute of repose makes exceptions for victims of toxic torts while our statute does not.

I do not want to get into great legal detail here, but there is a charge that has been continually repeated against S. 100 that bothers me. People who have attacked the bill somehow believe that middle America courts, such as the Supreme Court of Illinois, have adopted some type of absolute liability. In the key areas of this bill, dealing with warnings and design of products, this is simply not the case. Let me quote very briefly a recent Supreme Court of Illinois opinion. The court said:

"We perceive that requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and the adequacy of the warning, . . . the inquiry becomes whether the manufacturer, because of the 'present state of human knowledge', . . knew or shoud have known of the danger presented by use or consumption of the product. Once it is established that the knowledge existed is the industry of the dangerous propensity of the manufacturer's product, then the plaintiff must establish that the defendant did not warn, in an adequate manner, of the danger." *Woodill* v. *Park Davis & Co.*, 79 Ill. 2d 26, 37 Ill. Dec. 304, 402 N.E. 2d 194 (1980).

I plan to submit to this committee a more detailed comparison of S. 100 with the law of Illinois. I think you will find that they are remarkably similar.

In closing, as one who has followed this issue in the state legislative houses, I am not troubled in any way by the Federal Government acting in this area. This is one of the few areas where the Federal Government should act because the states cannot resolve the problem themselves. That has been proven. I also can testify that while there may be some differences of opinion about various provisions in S. 100, it is on the whole a fair and balanced piece of legislation that will help small business in the state of Illinois without adversely affecting consumers. I hope this committee will report the statute out promptly to the floor of the United States Senate.

Senator KASTEN. Mr. Ryan, we thank you very much.

Our next witness is the Honorable W. Ward Reynoldson, who is the chief justice of the Iowa State Supreme Court and also is appearing here as president of the Conference of Chief Justices.

Mr. REYNOLDSON. Mr. Chairman, and members of the subcommittee, the Conference of Chief Justices appreciates the opportunity to express its views on the Product Liability Act now proposed as S. 100.

We continue to believe that the legislation, despite some of these helpful amendments, is a step backwards in the complex area of the law, and even more importantly, a threat to the vital role State courts play in our Federal system.

I am W. Ward Reynoldson, chief justice of the Supreme Court of Iowa, and I appear in my role as president of the Conference of Chief Justices, an organization composed of the highest judicial officers of the 55 States and territories and the District of Columbia. I also appear as a substitute here for our preferred witness, former Chief Justice Jack Pope of the Supreme Court of Texas who was unable to be here today.

Because I am a substitute, I am making this appearance on a short notice, and my remarks will necessarily be limited and general in nature.

I want to begin, of course, by reaffirming our support for the past testimony of Chief Justice Pope, and incorporate in this record, by reference, if I may, his prepared statement and remarks at your hearings on April 27, 1983 and March 5, 1984.

In our view, this bill that is now proposed, as the prior bills, would effectively nationalize the State judiciary, in addition to up-

setting the carefully crafted law of the States. It has all the shortcomings of the earlier bills, including new and different language and standards that will make it impossible to obtain the uniformity that is its proposed principal goal.

It is unrealistic to believe that 55 independent judicial systems, each starting afresh from its own perspective on the law, will reach the same interpretations of numerous terms that are contained here, like "otherwise identical units," and one which in section 2(13) defines "product user" as a person in "control of the product."

One cannot help but wonder if the lady who got out of the Ford car that slipped from park into reverse—we have all had those cases, I suppose, in every State; we had them in Iowa—who went back to close the garage door and was killed when the car slipped into reverse, was actually in "control of the product." If the car belonged to her husband it could not be said that she was the owner. Nor could it be said that she was operating it. But was she in control of it so as to be a "product user"?

I submit under those circumstances that question of control could be interpreted in a different manner in various jurisdictions, both in the State and Federal courts, under the language in this bill.

It is interesting, of course, that the goal of uniformity is claimed here. We wonder how it really can be attained when the burden of resolving these conflicts under this bill would fall on the U.S. Supreme Court.

Those Justices, of course, are telling us with extreme urgency that they are unable to handle the present case load. They are telling us that the existing inner circuit conflicts reflecting different interpretations of present Federal law between the 13 circuit courts of appeals, and in the unified Federal system, are beyond the capacity of the U.S. Supreme Court to sort out and resolve. And they say there is a critical shortage of resources to deal with this problem at the apex of the Federal judicial system.

The Chief Justice of the United States has been imploring Congress to authorize a short-term experimental inner circuit tribunal of the U.S. courts of appeals to help the Supreme Court deal with this lack of uniformity in the national law at the present time.

This brings me to a point I want to emphasize with what little I can add to Justice Pope's statement. Within the last 2 weeks I have had the pleasure and the honor to participate in a national seminar on the administration of justice at Colonial Williamsburg, sponsored by The Brookings Institution in cooperation with the Chief Justice of the United States, the Attorney General, and the chairmen of the House and Senate Judiciary Committees. And the seminar provided a mechanism for those people to bridge the gap, informally, between the separation of powers and to explore the problems facing the Nation's justice system.

The leading topics on this year's agenda were "Anticipating the Federal Judiciary's Future and Future Needs," "Legislative Expansion of Federal Causes of Actions and its Impact on Judicial Resources," "Ensuring a Judiciary of Quality," and there was also a segment on "Federal-State Relations." We talked about this Product Liability Act. We also talked about the status of the State Justice Institute created by the 98th Congress. There was general

agreement that there were problems facing the Federal judiciary that cannot be met simply by adding more Federal judges, and that these problems were tied up and intertwined with the problems that we have at the State level.

We talked about the impact of diversity jurisdiction upon Federal case loads, and of course, those 18,000 cases in 1984 that were filed in habeas corpus and the 1983 cases. The discussion included renewed calls for the creation of a Federal Court Study Commission to seek long-term solutions.

It seemed to us, and I think it was the consensus of the people there—I will terminate.

Senator KASTEN. We will ask you just to summarize.

Justice REYNOLDSON. Yes. We think the efforts of Congress ought to be devoted to resolving the present jurisidictional difficulties and to coping with the case loads, both at the Federal and State level, by: First, pass S. 601, the Federal Courts Study Commission Act; second, authorize the inner circuit tribunal, which would not cost much money and would help get some uniformity in the present system of Federal litigation; and third, to provide adequate funding for the State Justice Institute that the Congress was kind enough, and wise enough to pass last year.

I think with those steps we could get our national judicial system into position to handle our litigation that we have going on, without taking on this additional burden.

[The statement follows:]

STATEMENT OF THE CONFERENCE OF CHIEF JUSTICES

Mr. Chairman and members of the subcommittee. The Conference of Chief Justices appreciates the opportunity to again express its views on the Product Liability Act, now proposed as S. 100. We continue to believe the legislation, despite some helpful amendments, is a step backward in this complex area of the law and, even more importantly, a threat to the vital role state courts play in our federal system.

I am W. Ward Reynoldson, Chief Justice of the Supreme Court of Iowa and appear in my role as President of the Conference of Chief Justices, an organization composed of the highest judicial officers of the 55 states and territories and the District of Columbia. I also appear as a substitute for our preferred witness, former Chief Justice Jack Pope of the Supreme Court of Texas, who is unable to be here today.

Because I am a substitute and am making this appearance on short notice, my remarks will necessarily be limited and general in nature. But I want to begin by reaffirming our support for the past testimony of Chief Justice Pope and incorporate in this record by referrence if I may, his prepared statements and remarks at your hearings on April 27, 1983 and March 5, 1984. These are printed at Pages 235 ff in S. Hrg. 98-302 and at Pages 378 ff in Part 2 of the same hearing record.

Chief Justice Pope's testimony, covering the original and revised versions of S. 44 in the 98th Congress is, with few exceptions, as applicable to the present as to the earlier bills. S. 100, like its predecessors, would effectively nationalize the state judiciaries in addition to upsetting the carefully crafted law of the states. It is simply unprecedented in the depth and scope of the preemption proposed. It has all the shortcomings of the earlier bills including new language and standards that will make impossible the uniformity that is its principal goal.

It is, as Chief Justice Pope noted, absurd to believe that 56 independent judicial systems, each starting afresh from its own perspective on the law, will reach the same interpretation of such terms as "proximate cause," "otherwise identical units," and "economically feasible for use!" The burden of resolving these conflicts will fall on the Supreme Court of the United States whose justices are telling us with increasing urgency that they are unable to handle their present caseload. More directly to that point, they are telling us that existing intercircuit conflicts, reflecting differing interpretations of federal law between only 13 circuit courts of appeals

within the unified federal system, are beyond the capacity of the Supreme Court to resolve.

There is, in short, what those closest to the problem believe is a critical lack of uniformity in our existing national law and a critical shortage of resources to deal with this problem at the apex of the federal judicial system. The Chief Justice of the United States is virtually pleading with the Congress to authorize a short-term, experimental Intercircuit Tribunal of the United States Courts of Appeals to help the Supreme Court deal with this lack of uniformity in the national law.

This brings me to the point I want to emphasize in what little I can add to what Chief Justice Pope already has said on behalf of state court systems. I had the pleasure and honor to participate less than two weeks ago in the national Seminar on the Administration of Justice at Colonial Williamsburg sponsored by the Brookings Institution in cooperation with the Chief Justice of the United States, the Attorney General of the United States, and the chairman of the House and Senate Judiciary Committees. The Seminar provides a mechanism by which these officials can informally bridge the separation of powers and explore together the problems facing the nation's justice system. The leading topics on this year's agenda were: "Anticipating the Federal Judiciary's Future and Future Needs," "Legislative Expansion of Federal Causes of Actions and Its Impact on Judicial Resources," and "Ensuring a Judiciary of Quality." There also was a program on "Federal-State Relations" which included a brief discussion of the Product Liability Act and the status of the State Justice Institute created by the 98th Congress.

There was general agreement, as there has been for many years, that the problems facing the federal judiciary cannot continue to be met by the simple addition of new federal judgeships But it also was clear that these problems are inextricably tied to issues that involve the states and their judicial systems.

It was noted, most importantly, that more than 20 percent of the federal caseload, and an even larger percentage of the jury trials, involve state law cases brought to the federal courts under diversity of citizenship jurisdiction. Another large percentage of the federal caseload is comprised of habeas corpus petitions seeking federal review of state criminal convictions, as well as the rapidly increasing number of civil rights actions brought under 42 USC 1983 by state prisoners and other persons in state institutions. It was generally agreed that elimination of diversity jurisdiction and a reduction in habeas corpus filings by state prisoners are among the most important steps that can be taken to relieve the pressures on the federal system.

The discussions included renewed calls for creation of a Federal Courts Study Commission to seek long-term solutions to the problems of the federal courts, including jurisdictional and other issues that involve relations with state court systems, as well as authorization for an Intercircuit Tribunal of the United States Courts of Appeals to help give coherence to existing federal law.

Given the seemingly insoluble problems facing the federal judiciary, and their relationship to the role of state courts in our federal system, it seems untimely and inappropriate in the extreme to introduce changes as far reaching and disorienting to both systems as those contemplated in the Product Liability Act. Our first task should be to bring order to the present relationships between state and federal courts in what is, in the final analysis, a delicately balanced national system of justice. Instead of throwing this great unknown into that precarious balance Congress should be taking the steps necessary to the effective functioning of our justice system as a whole, and for as far into the future as we can see. This means a hard look at the present jurisdictional arrangements and decisions on what the jurisdiction of the federal judiciary should be. It makes no sense to federalize a significant portion of state tort law while denying jurisdiction to the federal courts except under diversity of citizenship, when diversity jurisdiction in the view of most expert opinion, should be eliminated as a first step in reform of our dual court system. The House twice in recent years has voted to deny a federal forum to these state law cases and there is reason to believe this change ultimately will be made.

Until such long-standing issues as diversity jurisdiction can be resolved, Congress should not add a new mix of jurisdictional questions to those already plaguing our courts, both state and federal. There is, for instance, increasing use of the certification process by federal courts trying diversity cases under state law. This means that a federal court will ask a state supreme court to certify the answer to an an unresolved issue of state law that applies to the case at hand. Further, under existing law and practice diversity cases can be appealed from federal district courts to the circuit courts of appeals. But because they are based on state law questions they are rarely appealed on to the Supreme Court where cert is routinely denied.

But S. 100 would add new complexity to federal resolution of diversity cases because product cases now would be based on questions of federal law that inevitably

would lead to new intercircuit conflicts which, as we have noted, are beyond the Supreme Court's present capacity to resolve. When you add conflicting opinions of 50 state supreme courts interpreting the same complex federal law, you create a web too complex for the Supreme Court to untangle. And this does not attempt to analyze the chaos that could result in state courts, but particularly in federal courts under diversity jurisdiction if, as Chief Justice Pope anticipated, there are two defendants in a single proceeding, one to be proceeded against under federal law and practice and the other under state law and procedures. Nor can we even begin to guess the extent to which the passage of S. 100 would increase the number of product cases filed in the federal courts. Since many if not most cases would involve diversity of cititizenship, and since federal courts are presumed to be more experienced in the application of federal law, would not many more plaintiff's lawyers chose the federal forum over the state?

At this point in the evolution of our unique state-federal judicial system the crying need is for the resolution of existing problems, not the creation of new ones as disruptive as those certain to follow enactment of S. 100. The Conference of Chief Justices would suggest that Congress could most appropriately deal with the complex to issues facing our dual court system by taking these three steps.

First, Congress should pass S. 601, the Federal Courts Study Commission Act. The Commission would be charged with making a comprehensive study of the methods by which we presently resolve disputes in both the federal and state court systems and develop a long-range plan to improve the federal courts that would be fully consistent with improvement of state judicial systems. Because the Commission would be composed of members of the House and Senate, as well as the federal and state judiciaries, its recommendations can be expected to result in effective action. There is every reason to believe that problems such as those associated with the product liability system would be effectively addressed and dealt with in the Commission's reports and recommendations to Congress.

The second helpful step would be authorization for the proposed Intercircuit Tribunal of the United States Courts of Appeals to see if we cannot cure the existing lack of uniformity in our national law. The Tribunal, as reported by the House Judiciary Committee in the last Congress, would act as a national en banc Court of Appeals to resolve intercircuit conflicts referred to it by the Supreme Court. It would be compose of judges selected from the existing courts of appeals and would require little in the way of addition judicial resources.

The third step we would suggest would be adequate funding for the State Justice Institute which the last Congress authorized to begin functioning on October 1 this year. This Institute, working in conjunction with the proposed Federal Courts Study Commission, will provide an indispensable resource in finding and implementing the long-term solutions to the complex of problems that must be resolved if our judicial systems are to meet the demands of the future.

In closing I will comment very briefly on the new Section 17 which would create a Product Liability Review Panel of three legal scholars to undertake, as best I can understand the intent, three very large tasks. First, the panel would recommend legislation to provide a mechanism for compensating persons who would not qualify for recovery in tort under S. 100. Second, the panel would serve as a substitute for the thousands of state judges now involved in development of the common law by monitoring the adjudication of cases under S. 100 and recommending amendments to deal with revealed, if not unanticipated, inadequacies in the statute. Third, the panel would conduct studies and report to Congress on the feasibility or availability of programs to provide compensation in product cases without regard to fault. Members of the panel would be compensated at a fixed rate for their time on the job but would not, as far as I can tell, have staff to assist them. While three professors of like mind could perhaps reach easy agreement on the reports required for tasks one and three, they may well find it difficult to perform the oversight and review functions necessary to keep S. 100 fresh and new.

While we would not, in the event of passage of S. 100, downgrade the importance of the review panels assigned tasks, we think problems of the product liability system could be addresed more effectively in the context of the broader studies and recommendations, including those on alternative mechanisms for the resolution of disputes, envisaged by the Federal Courts Study Commission Act.

It also is important to note that the review panel, which will in effect be evaluating the work of state judges in the application of a federal law, will be appointed by the Judicial Conference of the United States. The Judicial Conference, as you know, is headed by the Chief Justice of the United States and is composed of the chief judges of the federal circuits plus a district judge from each circuit. It is my understanding, at least, that the Judicial Conference is primarily concerned with setting

policy for the administration of the federal courts. It does not appear to take policy positions on legislation creating or amending substantive law and has no staff other than that provided by officials of the Administrative Office of the United States Courts and indirectly by the Federal Judicial Center. While Section 17 does not give the Conference administrative or policy making control over the review panel, the simple power of appointment provides some basis for influencing the products that will result. We would, of course, defer to the judgment of our federal colleagues on the creation of such a panel within the judicial branch of the federal government and would suggest that their views be solicited on that point, if they have not been. My limited reading of the hearing record does not indicate any participation by the Judicial Conference in the proceedings of this Committee on S. 100, despite the very significant impact the legislation would have on the federal courts. I presume their policy against commenting on substantive law accounts for this omission, but it should not prevent an expression of their views on the propriety of their appointing and providing administrative support for the review panel, or on the impact of this legislation on the federal courts.

Thank you for your attention. I will be pleased to respond to any questions if time permits.

Senator KASTEN. Our next witness is Mr. Banks, but the Senator from South Carolina wants to make a brief comment.

Senator HOLLINGS. Mr. Chairman, I just wanted in accordance with the Justice's request, that we include the Pope statement in the record at this particular point.

Senator KASTEN. Without objection, so ordered. And Mr. Pope has appeared before this subcommittee numerous times, I think.

[The material follows:]

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Senator KASTEN. We will begin the panel with the Honorable Jack Pope, who is Chief Justice of the Supreme Court of Texas, who is appearing at the request of Senator Hollings.

STATEMENT OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS

Judge POPE. Thank you very much, Senator. I do deeply appreciate this opportunity to appear and testify. I am accompanied this morning by the constitutions of 50 States, the Constitution of the United States, hundreds of years of common law in the negligence field, which years have not been preempted.

I appear on behalf of my State, of which I am the chief justice. My concerns are not the terms of the proposed bill. Many of those terms I applaud; some of them I would alter. My concern is the system and what the bill will directly do to it and what it portends for the future of State judiciaries.

First, I respectfully suggest that the bill, if enacted, will nationalize the judiciary of the States. It preempts the major part of negligence and products law. It preempts parts of contract law, insurance and fraud law. It freezes the law while it is still developing. It displaces the States sovereign charge and their abilities to structure and develop the common law, as traditionally and historically they have done.

It wields the commerce power in a fashion that would impair the States ability to function in a Federal system. It forces directly upon the States its choices as to how essential decisions about the conduct of the judiciary are to be made.

I say with respect, Mr. Chairman, that if comparable requirements that are here proposed at the decision level of a branch of government, if a comparable requirement were imposed upon corporate decisionmaking of all of the affected suppliers it would meet with an outcry of nationalization of industry, and I would join them in that outcry.

When we nationalize a branch of a government, it becomes very easy to nationalize industry itself. If Congress and industry can nationalize the States and their judiciaires, surely it will be easy to nationalize the whole insurance industry. I know of so act of Congress that has affirmatively invaded the traditional common law of torts, contracts, insurance fraud, deceit, warranties, State statutes and State constitutions as this act.

Second, the proposed law is a threat to Federalism. I read in the hearings report that Federalism is intact under this bill because there will be no new bureau and no additional cost to the Federal Government. We do not have those now. The system is now selfoperating. But a statute that abolishes in whole or in part a whole branch of State government needs no bureau. It is a preemption to the point of extinction.

Third, the proposal destroys the common law. I am the head of a judicial system that disposes of, in the county courts and in the district courts, 1,200,000 cases by judgment every year. The total of all Federal litigation disposes of one-fifth, 240,000 cases. I say that this proposed bill is killing the system that has developed 342 branches of the law.

Fourth, this is an unspoken attack upon the common law jury. A safe product indemnifies and protects the supplier. A safe product produces no damages. It is the unspoken findings of juries, those findings, that have driven from the market, not through the Federal Government but through the judicial system, the Pinto, flammable fabrics, thalidomide, birth control pills, and rifles.

And, finally, I say that this is an attack upon the U.S. Supreme Court. Five Justices in the last 12 months have cried out to this Congress to give them some relief. That relief has not come, and if we do with this act and impose upon the U.S. Supreme Court what the experience of FELA has done, we have put all of these cases in the channel that have no place to go except the U.S. Supreme Court to adjudicate conflicts.

I thank you, Mr. Chairman, and I do have a statement that I would like for the record.

[The statement follows:]

STATEMENT OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS

Mr. Chairman and distinguished members of the committee. I am Jack Pope. I am and appear as Chief Justice of the Supreme Court of Texas. I thank the committee for the invitation extended on Wednesday of last week to appear and express the views of a common law judge, and those of a judge of the state courts. It is the state courts that try and dispose of 98 percent of all lawsuits in this nation. In my jurisdiction the county and district trial courts render judgments in 1,200,000 cases a year. The Federal courts of all of the United States render judgments in less than a quarter million cases a year. So I am talking about the courts and the judiciary that are the ones who actually eye-ball and administer justice to the citizens of this country.

I have read as much of the testimony in the hearings before this committee as my limited time permitted. To this point the emphasis has been focused upon the costs to those who furnish things placed in the stream of commerce. With respect, I want to broaden this perspective and address some more fundamental principles and subjects.

THE PROPOSED COMPARATIVE FAULT BILL WILL NATIONALIZE THE JUDICIARY OF FIFTY STATES, THE DISTRICT OF COLUMBIA, AND SIX POSSESSIONS

The bill "supercedes any State law regarding the matters governed by this Act." S. 44 § 3(c). Those matters intrude upon the whole area of tort reparations and parts of contract law. The preemption is stated in the bill to include (1) strict or absolute liability in tort, (2) negligence or gross negligence, (3) breach of express or implied warranty, (4) failure to warn or instruct, (5) any other theory that is the basis for any award for damages for loss or damage caused by a product. *Id.* § 3(a). These matters have always been the domain of the states.

In Texas, the "any other theory" will effectively repeal provisions of our Deceptive Trade Practices Act and probably others. Tex. Bus. & Com. Code Ann. §§ 17.41-.63 (West Supp. 1982). The Texas DTPA protects persons physically harmed by defective products that were sold on representations that the products were of a particular standard quality, or grade when they were of another. *See Hurst* v. *Sears, Roebuck & Co.*, 26 Tex. Sup. Ct. J. 278 (March 16, 1983). This proposal would repeal that law. If you enact this proposal, you will also oust the Texas Legislature from enacting laws that apply to tort cases or that avoid fraud and deception that cause physical harm.

The nationalization of state judiciaries concerning tort reparations and related contractual rights is the most far-reaching attack upon an independent judiciary and constitutional government since President Roosevelt's court-packing bill. Roosevelt, a result-oriented President, following his great 1935 victory at the polls, made an effort to control the Supreme Court. The outcry, from those who wanted the court system free from interference, resulted in the defeat of the proposed legislation.

We today hear an outcry about jury verdicts, but from the other side. President Roosevelt wrote a Florida lawyer in 1935: "[W]e do not want to take away states' rights but, at the same time, there are a good many problems which, under modern conditions, can be solved only by Federal action." Letter from Roosevelt to Armis-

tead Brown (July 6, 1935) (Roosevelt Papers, Hyde Park). Today we read in the report of this committee on S. 2631 the same reason for intruding upon state judiciaries:

"Experience with the state approach and the realities of the marketplace demonstrate that the individual States cannot resolve the uncertainties in the product liability tort litigation system. The Committee believes that Federal action is necessary."

S. Rep. No. 670, 97th Cong., 2d Sess. 7 (1982).

The lesson from history is to leave the judiciary alone. Those who have the votes today may lose that advantage. Neither President Roosevelt nor this committee should intrude upon the judicial branch of government.

This proposal attacks the court decisions of developed and developing law; it attacks and negates the progression of the common law; it supplants the procedures by which we submit issues and admit evidence; it substitutes untested standards for settled standards used in the state courts.

Congress should not enter the field of substantive tort law that is administered by each state. If Congress intrudes into this area, it will be easy to intrude into the whole field of insurance law, contract law, family law, juvenile law, criminal law, and all of the others.

THE DECLARED PURPOSE TO ACHIEVE UNIFORMITY OF STATE JUDICIAL PROCEEDINGS VIOLATES OUR SYSTEM OF FEDERALISM

The same Constitution that created the Congress also secured the state and its judiciary. The judiciary of a state is not a creature of Congress. States are not creatures of Congress. States are not agencies of Congress. States and their judiciaries are as constitutionally secure as this Congress. I do not question the right of Congress to regulate interstate commerce; I question the policy as well as the right of Congress to supplant a constitutional branch of state government.

It is one thing to regulate commerce, but a great constitutional question is presented when Congress regulates the state judiciary. There are attributes of sovereignty attaching to every state government that may be impaired by Congress. *National League of Cities* v. Usery, 426 U.S.833 844 (1976). The constitutionality of the bill is perhaps the first question that must be added to the present burdens of the U.S. Supreme Court. I suggest that such a first question is an unnecessary and a disruptive one. It will arise only if Congress adopts a New Deal, Fair Deal, Great Society approach and nationally moves upon state judiciaries to get them in line. Those other administrations did not tamper with the judiciary.

THE PROPOSAL DESTROYS THE COMMON LAW

Products liablity is the child of the common law. I find it remarkable that critics complain that the common law varies from state to state. The field of products liability would never have emerged if the common law of those first few states had not varied from the others. The common law is still growing from the experience of the states. It should not be killed by a statute and especially not while still growing.

The report on S. 2631 attacks the development of strict liabilty by the common law. S. Rep. No. 670, 97th Cong., 2d Sess. 3-6 (1982). It concludes that this development is bad. The common law has never needed me or anyone else to defend it. It has matured our principles of contract, tort, property, insurance, and some 430 other bodies of law. It has been the means by which we hold onto the certainty of the past while moving deliberately one step at a time into the challenges of the future. I leave the defense of the common law to Lord Coke and Lord Mansfield, to Justices Holmes and Hand and Cardozo and a thousand others whose genius has molded our common law.

Don't kill the common law.

THE PROPOSED BILL IS AN ATTACK UPON THE JURY

Witness after witness has appeared before this committee with stories about the costs to industry of products litigation. Juries of this country consider costs also, but they do not ignore costs about which there has been no substantial testimony before this committee. They also weigh costs to customers who are hurt and killed. In court, the issue is whether the manufacturer factored the element of safety into the product. A defendant whose product is safe wins; one whose product is unreasonably dangerous loses. The issue in court is product safety. I do not find that "safety" has been given the consideration that juries do. It has been the juries of this country that have looked at the costs to industry as well as costs to the customer. One thing

in these trials has been uniform in every side. Every one of those jury findings has been upon an issue that asked if the product was unreasonably dangerous.

It is the justice system and not industrial engineers who are driving from the market many deadly products that have been approved by governmental regulatory agencies and industrial safety examiners. It was after the products were "in the stream of commerce" that they were driven out in the case of Pinto, flammable fabrics, thalidomide, birth control pills that caused cancer and stroke, tampons that produce toxic shock, and many others.

It is the juries of this country that pass on these issues after hearing witnesses. If this committee desires to see the costs involved, I feel sure that this room could be filled with living exhibits of paraplegics, quadraplegics, wheel chair professionals, deformed children without limbs, burned bodies, cripples, vegetables. These too are costs.

THE PROPOSED BILL IS AN ATTACK UPON THE DEVELOPED TRIAL PROCEDURES OF EVERY STATE

Products liability is the present style of the law. We have developed in our jurisdiction settled principles for a simple submission of cases that concern (1) unreasonable defective products, (2) design defects, or (3) marketing defects. We have developed fair issues and fair instructions. This had not been easy, but every lawyer in Texas knows what his charge will look like, because the rules are developed and published. This no doubt is true of all jurisdictions.

We have a settled and reckonable body of substantive law, procedure, and evidence. We have resolved many problems that we ought not to revive. We have not answered every question. For example, we have in Texas a problem about two conflicting statutes concerning the right of contribution, but we will resolve that one too.

The proposed bill injects into the proceedings many new questions. For example, it changes our definitions about design defect. It raises a question whether sections 5(c) and 5(d) are absolute defenses. If so, it is confusing in a comparative fault bill to add new absolute defenses. We have the same unsettled questions about section 6(d).

State judges have arduously worked to determine what part of a charge should be handled by issues and what part of instructions. The bill is not helpful. The proposed bill renders our body of settled law in hopeless confusion, the thing that generates work for the United States Supreme Court.

The proposed bill invalidates efforts to simplify the trial of negligence, products, and related cases.

Driver A sues both driver B and supplier C. A court cannot try in the same case the supplier C under the novel procedures of this bill and try driver B in the same case under simple Texas procedure. Since supplier C's case must be tried by the terms of the bill, the Texas procedures and rules must be scrapped.

A sues doctor B and doctor B impleads C, the pharmaceutical company. The suit against the doctor cannot be tried under one system and the suit against C by another.

This act wrecks all progress that every state has made in the simplification of personal injury cases.

FEDERALISM SHOULD CONTINUE AS A VIABLE FORCE IN OUR CONSTITUTIONAL SCHEME

The declared purpose of this bill is to enforce uniformity in every state. It undertakes to legislate uniformity in substantive law, procedure and evidence, and to supplant state input in order to achieve that purpose. We do not live in a uniform world or society. We do not sing the same song or the same note. We belong to diverse political parties. The fifty states have diverse laws that govern many subjects—capital punishment, divorce, the sale of liquor, blue laws, the government of cities by home-rule or territorial laws, child and spouse support laws, probate laws, sales, insurance—the whole index of laws that are in some ways different. But there is similarity in the diversity. We review each other's laws, sift from them what we find good and reject what we find bad. We exchange, borrow, adopt, move forward. This is the power of innovation.

Diversity and pluralism nurture and enrich the whole law. They are the essence of our federal system. The strength of our legal culture has been our capacity to take the good from here and there. We should not abort this system.

State governments and state judiciaries have been the outriders of our whole society. Uniformity imposed from Congress over our whole nation would have robbed us of the many contributions from the great State of Wisconsin, the state of the chairman of this subcommittee. It was the diversity, pluralism, and experimentation

practiced by that state that contributed to the entire nation such ideas as the direct primary, initiative and referendum, the corrupt practices acts, civil service, lobby control, public utility commission, state inheritance taxes, unfair trade practice acts, stock regulations, child and female labor laws, and worker compensation laws. These and scores of other values are the products of our federal system.

When Texas moved to comparative negligence, we looked to the State of Wisconsin to profit from its experience. We bought Wisconsin law books that taught us how it would work with simple special issues and we used them. I personally traveled the State of Texas lecturing lawyers on how it could work. I taught them the Wisconsin system. This committee in its proposed bill is borrowing from that same system. We have moved from comparative negligence to comparative fault. I applaud that. We have drafted a bill in Texas that adopts the same sound principle. We thank you, but we do not need help in seeing it through. Our legislation will probably be enacted before this bill.

THE PROPOSED BILL THREATENS THE SURVIVAL OF THE UNITED STATES SUPREME COURT

The proposed bill may be the final impact that submerges the United States Supreme Court in a sea of cases. It will channel the deluge of statutory construction and conflicts cases to that court.

Section 3(d) says that "The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code." That means that all cases except diversity cases will reach the U.S. Supreme Court by going through the state courts.

Fifty jurisdictions will begin construing terms, such as "proximate cause," "otherwise identical units," "practical technological feasibility," and scores of others. Conflicts of statutory construction and application are inevitable. Those conflicts will be eligible, at least, for review by the Supreme Court. Even though the U.S. Supreme Court may not grant a writ, its time and energies must be used to study it to make that decision.

The experience with F.E.L.A. cases is in point. The Congress legislated about negligence cases. Cases then reached the U.S. Supreme Court in larger numbers, and that court granted writs on points that questioned the sufficiency of the evidence to support jury findings. The court was pressed to research and write opinions to explain why they accepted so many negligence cases. They were construing a federal statute and the judges believed that state courts should not reverse cases favorable to the plaintiff, on the grounds that a finding was against the great weight of the evidence, or that the evidence was insufficient.

The reason assigned for granting writs to review evidence in a case that the facts would not again be matched was to "secure uniformity of decision." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1922). Justice Frankfurter resisted the numerous grants except when there were "questions that fairly involved the construction or scope of the statute." *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 532 (1956) (Frankfurter, J., dissenting). His dissenting opinion in *Rogers* detailed how each term of court was burdened with written opinions on these negligence cases involving a review of facts. *Id.,* at 548–58. The many writs were granted to set a "mood" so state courts would reverse no cases for the plaintiffs.

Chief Justice Warren E. Burger has long tried to find a Congress that will listen to him before the whole system collapses from overload. He repeated last February before the American Bar Association what he has been saying for thirteen years. He said that "in just the short span of 14 years, Congress has enacted more than 100 statutes creating new claims, entitlements and causes of action." Burger, *Annual Report on the State of the Judiciary,* 69 A.B.A.J. 442, 442–43 (1983). He said that in many cases "there are few precedents to guide the courts . . ." *Id.* In addition to the increased number of written opinions, that court had 5,311 cases on its docket. All of those cases must be reviewed for a determination whether a writ will be denied or an opinion written.

Justice O'Connor, the day before the Chief Justice made his address, spoke to the Fellows of the American Bar. She said that the court was already working at maximum capacity. Justice Rehnquist said the same thing in an address on April 7 to the Jurists-in-Residence at St. Louis. On August 9 of last year, Justice Powell, speaking to the A.B.A. Division of Judicial Administration, warned that this situation is not a crisis for the courts; it is a crisis for justice, for claims for human rights, for the rule of law, for the nation. Justice Stevens, speaking on August 6, 1982, at the annual Banquet for the American Judicature Society, said that the court is granting more petitions, writing more pages and more opinions and is decid-

ing more cases than ever, but is losing ground. He said the court is too busy working to tend to the problem of being too busy.

With all of this, we would wipe out the developed jurisprudence of fifty states and start over making new precedents, creating conflicts that have no place for resolution except in the United States Supreme Court.

This is attack upon the Supreme Court of the United States.

I respectfully ask that this subcommittee and this Congress leave to the judiciary the resolution of questions that have always been their responsibility. I ask that you leave the state judiciaries alone. This far-reaching bill, if enacted, will leave too many established institutions in peril.

The bill itself, I suggest, is unreasonably dangerous.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. The rationale for enacting a Federal product liability law is based, in part, on the fact that manufacturers and product sellers doing business on an interstate basis are subject to varying standards of liability in the various states. Do you believe that family law, juvenile law, criminal law have the same interstate commerce aspects as product liability?

Answer. I believe that under the United States Supreme Court's interpretation of the commerce clause, Congress would be able to legislate in the family, juvenile, or criminal law areas as they choose. I also believe that those areas would be an improper subject for federal legislation just as this bill is an improper exercise of the commerce power.

Tort law has traditionally been left to the common law of the states for development as has contract law and family law. This bill directly intrudes into that development in contract law, insurance law, and evidence law as well as in tort law. Once this intrusion has begun, the precedent for future intrusion has been set. The foundation will be severely shaken by this bill. I do not believe that we should make this intrusion into that development with this bill.

Each individual state should evaluate its interests and policing considerations in formulating a standard of liability. If a manufacturer chooses to benefit from the market for its product in that state, he should be subjected to liability in that state under that state's standards.

Question. Do you believe that codification of contract issues through, for example, the Uniform Commercial Code or codification of evidentiary matters, through Federal and state statutes is an intrusion upon the judiciary and an attack on court decisions?

Answer. Yes. Any comprehensive codification of the common law presents some intrusion upon the judiciary. Adoption of the U.C.C. or the Federal Rules of Evidence, however, could never be considered precedent for such a measure as S. 44. If anything both the U.C.C. and the Federal Rules of Evidence serve as examples of the type of legislation most appropriate in a federalist government with clear separation of powers. The U.C.C. was not forced upon any state. Each state considered the model proposal and then made such modifications as it deemed appropriate to bring the code into line with the law of each jurisdiction. The U.C.C. is analogous to the Model Uniform Product Liability Act. S. 44 on the other hand preempts all existing state law despite the fact that a considerable number of states have rejected state-proposed changes similar to the changes proposed by S. 44.

The Federal Rules of Evidence present an even better example of when, if ever, the legislature should exercise a judicial function. The Rules were actually promulgated by the Supreme Court and then merely approved by an act of Congress. The Rules pertain only in Federal courts and do not affect state law. In fact, a federal court may be called upon to apply state evidentiary standards where there is substantive conflict. The Federal Rules may serve, however, as a guideline for those states seeking to change their existing law of evidence.

In September 1983 Texas courts will operate under new rules of evidence which are largely based upon the existing Federal Rules of Evidence. There are several significant, substantive changes in the Texas rules. One such change is an additional sentence to Rule 407 of the F.R.E. which precludes evidence of subsequent remedial measures to prove negligence or culpable conduct. The Texas Rule, however, provides that "Nothing in this rule shall preclude admissibility in products liability cases based on strict liability." Tex. R. Ev. 407(a) [effective Sept. 1, 1983]. This Texas evidentiary rule would be expressly preempted by S. 44 despite the fact that the Texas Legislature and Texas Supreme Court have considered the federal position and rejected it.

Question. Can you give examples of instances in which a product caused a harm not attributable to misuse, alteration, or modification of the product and liability should not be imposed on the manufacturer of the product? If so, can you specify a fair, clear test for separating those instances from cases in which liability should be imposed on the manufacturer?

Answer. Yes. A product may cause a harm, but unless it is found to be "unreasonably dangerous" the manufacturer should not and will not be held liable. The standard for "unreasonably dangerous" in Texas for manufacturing and marketing defect cases is:

"An 'unreasonably dangerous' product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics."

§71.01 3 State Bar of Texas, Texas Pattern Jury Charges PJC 71.01, 71.04 (1982). For design defect cases the standard of unreasonably dangerous is,

"A 'defectively designed' product is a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."

3 State Bar of Texas, Texas Pattern Jury Charges PJC 71.02 (1982).

Both standards utilize a reasonableness idea and apply them to the product itself. The jury can then evaluate each product under these guidelines. These standards are fair to both the manufacturer and consumer.

An example of a product not being found unreasonably dangerous when there has been no evidence of misuse, alteration or modification is *Boatland of Houston, Inc.* v. *Bailey,* 609 S.W.2d 743 (Tex. 1980). In that case the jury failed to find that the omission of a kill switch on a bass boat constituted an unreasonably dangerous (defective) design. The case was appealed because of the submission of erroneous defensive issues concerning the "state of the art" doctrine. The Texas Supreme Court reasoned that the submission amounted to only harmless error where the jury had determined that there was no defect and that failure to establish that the product was unreasonably dangerous because of defective design was sufficient to support a judgment that the plaintiffs take nothing.

Question. Would you support a bill that imposes liability for all harms caused by products?

Answer. No. First I would never support any bill that mandates the standard which the state judicial systems must impose. Tort law is a state concern. Irreparable harm to federalism would be caused by the intrusion of the federal government into the states' common law.

Second, I do not believe that a standard of guaranteed recovery is at all appropriate to harms that are caused by products. Manufacturers are not, and should never be, absolute insurers of their products. The policy considerations which cause Texas to enact workers' compensation, for example, simply do not compel such a system for product related injuries. I do believe that strict liability in tort is the appropriate standard of liability. The Texas Supreme Court has noted.

"We wrote in [1969] of our final yield to the irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm caused by defective products."

Turner v. *General Motors Corp.,* 584 S.W.2d 844, 848 (Tex. 1979). The choice made by Texas in 1969 should not be revoked by federal legislation in 1983.

Question. Would you support a bill that imposes liability for all harms caused by products with damage limitations similar to those in compensation statutes?

Answer. No. See answer to question 4 above.

Question. Do you believe that where there is an innocent manufacturer and an innocent plaintiff the manufacturer should pay for harms caused by a product? If so, why? Do you think the innocent manufacturer should pay even if the plaintiff has received compensation for the product-related injury from another source, e.g., from insurance of workers' compensation? Would your answer be the same if the innocent manufacturer is a small business that would go bankrupt if forced to pay?

Answer. "Innocent" is not a term used to describe the responsibility of a manufacturer of consumer products unless one is discussing the criminal (or lack thereof) nature of his behavior. "Innocence" and "guilt" have nothing to do with civil liability. The use of the word "innocent" in this context indicates to some degree the lack of understanding by Congress of the judicial process.

In those jurisdictions such as Texas where strict liability is imposed upon the manufacturer of a product, the "fault" of the manufacturer is not considered. Instead, focus is placed upon the product itself and whether or not the product is defective. The fault of the plaintiff is compared on a causation basis with the defec-

tiveness of the product. The rationale behind the imposition of strict liability is that the manufacturer who has made a profit from production is in a better position to distribute the risk and bear the costs of the injury than the consumer.

Authors Scott Baldwin, Francis Hare, Jr., and Francis McGovern suggest that "at least four general goals or social policy bases are commonly expressed to support the adoption of strict liability in tort: (1) to create an incentive to make 'safer' products, and conversely a deterrent to unsafe products; (2) to compensate victims . . .; (3) to allocate the risk of loss . . .; and (4) to increase accountability in the mass marketing of goods."

S. Baldwin, F. Hare and F. McGovern, *The Preparation of a Product Liability* case 32 (1981).

If the injured plaintiff is insured or covered by workers' compensation, he should still be entitled to recover full damages from the product supplier. Making the consumer insure against the risk of injury encourages carelessness on the part of the manufacturer. The manufacturer is in a better position to test the quality of his products and weed out the flaws.

Workers' compensation is a statutory scheme for compensating victims who are injured on the job. In exchange for a reduced burden of proof on liability, the worker receives a set amount of compensation according to his particular injury which is often well below his actual damages. Under this scheme the employer is required to provide workers' compensation coverage for his employees. In any case where a plaintiff receives compensation benefits and is successful against a product manufacturer, the employer's insurer s entitled to a right of subrogation for the amount of comp benefits paid. To limit workers' recovery to the amount of worker's compensation is to deny him a full recovery where he has clearly been wronged. To subtract the amount of comp recovery from the amount of damages attributed to the manufacturer (as S. 44 would do) is to shift to the employer's comp carrier the responsibility for unreasonably dangerous products. This would have two obvious results: workers' compensation insurance rates would escalate because comp carriers would no longer be able to receive subrogation and employers would be less, likely to provide innovative products for their employees use on the job.

The present system in Texas offers a far more equitable solution. The determination that a product is defective should place the entirety of the responsibility upon the manufacturer of the product which causes the harm. Workers' compensation should control employer practices and products liability should control the manufacture of unreasonably dangerous products. They are separate actions based on separate legal theories as a response to different societal needs.

My answer must be the same even if the manufacturer is a small business. It should not be a defense for a manufacturer of dangerous products that injure consumers to simply avoid liability by claiming his business is "small." Whatever size the business, the manufacturer is in a better position to insure against the risk of product-related injury than the consumer.

Question. Do you believe that a claimant should recover for product-related harms due to misuse of a product by the claimant or by a third party?

Answer. No, as long as the misuse is unforeseeable. A manufacturer should be held responsible for a product which is unreasonably dangerous for its foreseeable uses. A manufacturer should be held liable for injuries resulting for a use of the product that the manufacturer should have foreseen, not just the uses which it intended. The manufacturer is in the best position to anticipate the reasonable use to which the product will be subjected. The Restatement (Second) gives some examples,

"If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal comsumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger and a product sold without such warning is in a defective condition."

Restatement (Second) of Torts, § 402A comment h (1965). The misuse should be compared with the defect to determine relative causation and appropriate damages.

Question. Can you explain why a plaintiff will be unable to sue both a driver and a supplier of the motor vehicle in the same action if the federal bill were enacted?

Answer, The Total preemption by the federal bill of Texas law and procedures would practically prevent one trial against both defendants. For example, the bill would enact a pure comparative system of comparative responsibility. Texas negligence law is that of a modified comparative system in that if the claimant is found to be more than 50% negligent, recovery is barred. It would not be possible to allo-

cate responsibility under both systems in the same trail. Similar inconsistencies exist as to evidence rules, the effect of workers' compensation set ofs and punitive damages. If there were a single trial against both defendants, attempting to try the case under the special rules applicable under S. 44 and under Texas law would be impractical in my opinion.

Question. Would you support enactment of product liability statutes at the state level?

Answer, Generally, I am opposed to the codification of tort law because of the inadequacies of the codification process. Statutory gaps are inevitable. These gaps can be the source of great confusion which spawns litigation. Codification may also tend to freeze the evolving common law at a point that may not be flexible enough to deal with new developments. Further, codification involves political decision-making that tends to treat those actually injured as mere statistics and cannot weigh the real harm done to any particular individual.

State legislatures are, however, in a better position to "fine tune" common law development. Rather than attempting comprehensive statutory reform, the states may adopt specific statutory reforms to reduce the procudural complications inherent in complex, product liability litigation. An example of such fine tuning is the adoption of a comparative fault scheme (discussed in Question 15) which I have supported.

Question. You argue that diversity in the law of product liability is beneficial. How do consumers benefit by rules of law which are non-uniform and ever-changing?

Answer. Diversity in the law means that various schemes for allocating responsibility, compensating injured victims, and encouraging product innovation may exist at the same time. The differing jurisdictions serve as social loaboratories among which one might compare reasoning and results. The common law is constantly seeking a more equitable balance between the rights of consumers injured by defective products and producers. Of course, consumers also benefit from the innovation of new products; therefore, it is important that society by afforded the most efficient system for balancing these competing interests. S. 44 will freeze the law and thereby ignore the vast experience of the individual state jurisdictions. Diversity in the law maximizes the attainment of the societal values of safer products and product innovation because it provides a decision-making system that can deal with an ever-increasing number of contingencies in an ever-changing society.

Diversity also allows a state to establish standards of liability based upon the needs and policy goals of that state. If this country were a large, homogenous body with identical values and aspirations, uniformity might be a goal within itself. It is not. From the beginning, this country has been a union of states which joined together for common interests and are still free to reflect the differences among the states in, for example, standards of liability.

Question. Can you name an instance where the common law was replaced by a statute and, as a result, the law was more confused?

Answer. Yes. There are many examples. The example that comes most readily to mind is a situation that currently exists in Texas. Article 2212 existed in Texas long before adoption of § 402A of the Restatement of Torts. Tex.Rev.Civ.Stat.Ann. art. 2212 (Vernon 1971); *McKisson* v. *Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967). Article 2212a was adopted six years atter the approval of strict liability for products in Texas and expressly prevails over Article 2212 "to the extent of any conflict." art. 2212a § 2(h). Article 2212 addresses the pro rata contribution for torts generally and Article 2212a seeks to compare negligence by allowing a modified, percentage allocation of fault.

Under Article 2212 a defendant's responsibility is pro-rated according to the number of tortfeasors. If three defendants are held liable, each is responsible for only 33 percent of the judgment. Of course, under traditional theories of joint and several liability each of the three defendants may be called upon to satisfy the complete judgment but would always have rights of contribution against his co-defendants for 66 percent of the judgment. Problems are destined to arise whenever one tortfeasor settles for an amount that is actually determined to be more or less than his pro rata share.

By applying the existing common law to Article 2212, the Texas courts permitted the non-settling defendant to treat the settlement as either a pro rata reduction or a dollar-for-dollar share of judgment after a judgment has been returned. *See Palestine Contractor's, Inc.* v. *Perkins*, 386 S.W.2d 764 (Tex. 1964).

In theory, Article 2212a sought to legislate the Palestine Contractor's Doctrine in the negligence context. In effect, Article 2212a has brought nothing but confusion to the law and has been a source of constant litigation seeking to unravel the complex-

ities created by the statute. Article 2212a forces the non-settling defendant to choose between a dollar-for-dollar reduction or a percentage reduction even before the trier of fact allocates fault. *See* art. 2212a §§ 2(d)(e). Clearly Article 2212a changes the common law. Confusion is compounded whenever a defendant is liable under both strict liability and negligence theories or whenever one tortfeasor is held to be negligent and another is held to be strictly liable. Rather than solve the problems it was intended to solve, 2212a increases the difficulty of comparing causation because statutory language indicates that 2212a applies only to negligence while 2212 embraces remaining torts including strict liability. *See General Motors Corporation* v. *Simmons*, 558 S.W.2d 855, 862 (Tex. 1977).

Question. Would you oppose enactment of a Federal law defining and/or clarifying the liability of manufacturers for harms related to environmental pollution?

Answer. Yes. In an appropriate situation the federal government, of course, can directly regulate manufacturers as to environmental pollution. Violation of those regulations is a violation of federal law. I would oppose a federal bill which would impose upon the states mandatory standards of tort liability as an unwarranted intrusion into state common law and the state judiciaries.

Tort law is especially ill-suited to legislative intervention. As Dean Leon Green noted,

"Legislation usually covers too much or too little and is frequently couched in restrictive or ambiguous terms which the courts must modify and refashion to meet their needs. Moreover, it is more rigid and less subject to modification in view of change in either transactional or environmental facts.

"The time of legislatures is so absorbed with public affairs, budgets, police problems, provision for and regulation of public enterprises, taxation, and a score of other pressing problems that there is neither time, energy or interest left for the everyday problems of tort law. It is rare that tort legislation gets either the legislative ear or its approval unless it be supported by strong pressure groups who come with statutes already prepared and supported by persuasive advocates, it is hard to reduce the refinements of tort doctrine to statute form. About all that can be safely done is to give the courts direction by general terms and leave the refinements to be worked out through the litigation process. More frequently legislation in the tort field gives the courts more trouble than it gives assistance."

Green, *Protection of the Family Under Tort Law*, 10 Hastings L. J. 237, 246 (1959).

Question. S. 44 specifies a standard of strict liability of harms caused by products that are unreasonably dangerous in construction? Do you agree in the principle that this standard should apply in construction defect cases?

Answer. I agree with the principle that manufacturers should be held strictly liable for manufacturing defects that are a producing cause of harm. S. 44, however, abrogates the existing scheme of strict liability for manufacturing flaws by injecting a proximate cause standard as opposed to a "producing" cause standard. Often in products liability cases the product itself is destroyed making it virtually impossible for a plaintiff to prove proximate causation. *See Technical Chemical Company* v. *Jacobs*, 480 S.W.2d 602, 605 (Tex. 1972). Proximate cause differs from producing cause because it entails a consideration of foreseeability used in the determination of fault. "Fault" should not be a consideration in strict liability because it ignores the underlying rational behind strict liability—that the manufacturer is in a better position than the consumer to prevent manufacturing defects and to insure against possible risks.

In addition to promulgating what is essentially a negligence standard for construction flaws, S. 44 provides additional defenses which abrogate the principles of strict liability. S. 44 would bar causes of action based upon manufacturing flaws where harm is caused by an unavoidably dangerous aspect of the product. Again, the bill focuses upon the negligence of the manufacturer or user.

Question. S. 44 specifies a standard of strict liability for harms caused by products that are unreasonably dangerous due to breach of an express warranty. Do you agree in principle that this standard should apply in express warranty cases?

Answer. I agree with the standard except for the requirement of the material fact relating to the safe performance of the product. Texas law holds a defendant liable if he makes a representation involving a material fact concerning the product's character or quality. Material fact is defined as,

"a fact that is important to a normal purchaser by which the purchaser may justifiably be expected to be influenced in making the decision to buy the product."

3 State Bar of Texas, Pattern Jury Charges PJC 71.06 (1982). The Texas standard follows that standard set out in § 402B of the Restatement (Second) of Torts (1965). While the distinction is somewhat subtle, I favor the Texas version. I would not favor the imposition of any standard upon the states by the Congress.

Question. I understand that you support state product liability statutes and that you have worked on a "comparative fault" statute in Texas for a number of years. Do you believe that a "comparative fault" statute is necessary to create uniformity in the law throughout the state of Texas?

Answer. The purpose of a comparative fault scheme (which I do support albeit not through federal intervention) is not to create "uniformity in the law." "Uniformity" as defined as "equal application of the law" exists with or without a comparative fault scheme in Texas. Comparative fault is merely a means of allocating responsibility among tortfeasors. Fault may be apportioned on a percentage basis or on a pro rata basis (given three liable defendants each is responsible for 33% of the damages.)

Currently, Texas is operating with two comparative schemes: one is for negligent tortfeasors (Article 2212a) and one is for strictly liable tortfeasors (Article 2212 as applied in *Palestine Contractor's Inc.* v. *Perkins,* 386 S.W.2d 764 (Tex. 1964)). *See General Motors Corporations* v. *Simmons,* 558 S.W.2d 855 (Tex. 1977). Problems emerge whenever one tortfeasor is negligent and another is strictly liable. Different defenses are available to each accordingly to his theoretical position. The negligent defendant may be immune from liability if the plaintiff's contributory negligence is greater than fifty percent of the total. I personally favor a pure comparative fault scheme that establishes a single defense of contributory negligence. I think the Texas legislature is perfectly capable of adopting such a measure without the assistance of the federal government.

Should the Texas legislature choose not to amend the present law, however, Congress should not interpret Texas' inaction as a cry for help. Indeed it is quite the opposite. Allocating fault in cases that are currently being decided under Article 2212 would require a reassessment of the rights of consumers and producers in Texas. Such decisions are better made by the political body more closely associated with the populous whom the decisions will affect. Democracy is enhanced in this context when state legislatures are left free to determine the rights of their respective citizens. *See* discussion of legislative action and inaction in dissenting opinion in *Sanchez* v. *Schindler.* 26 Tex.S. Ct.J. 353 (April 27, 1983).

Question. If so, if approximately 70% of products manufactured in a state are sold outside of a state, then how could a Texas statute achieve uniformity for Texas manufacturers and sellers?

Answer. Again, a comparative fault scheme is not designed to "achieve uniformity" in the law. "Uniformity" is intended to mean "uniformity of results" is an unattainable goal in a system wherein each case involves different factual contexts. It would be impossible for a statute to assess differing levels of harm caused by differing types of products in differing sets of circumstances. Even with a national comparative fault scheme, a jury in Georgia may not allocate fault in the same manner a jury in Texas would. The facts may be only slightly different. The lawyers may be only slightly more effective. The court may interpret the statute in only a slightly different manner. And still the actual judgment could differ greatly from one state to the next. A comparative fault statute if adopted in Texas would simplify trial procedure in a products liability case and hopefully reduce the interpretive litigation spawned by existing statutory conflicts. The policy decisions made by each state should not be thwarted by vague attempts at such an ambiguous goal as "uniformity." Texas manufacturers who have so prospered under the fertile economic climate of this great state as to branch out their operations into neighboring jurisdictions subject themselves to the policy considerations that those jurisdictions have solemnly deemed important.

Questions of Senator Hollings and the Answers Thereto

Question. Proponents of S. 44 suggest that a principal purpose of the bill is to reduce transaction costs and inefficiency. How does essentially eliminating the doctrine of collateral estoppel affect judicial efficiency?

Answer. Collateral estoppel is primarily a device used to enhance judicial efficiency based upon the prior adjudication of an issue or a claim. Elimination of that doctrine could only create a greater workload for the courts.

Collateral estoppel is currently being used in rather innovative ways. Texas has not yet adopted or rejected these uses. I believe strongly that Texas courts should be allowed to weigh the arguments on both sides and reach a decision rather than have our decision imposed upon us.

Question. Would you comment on your perspective on legislating at the federal level in an area of traditional judge-made law?

Answer. Federal preemptory legislation in an area of traditional common law by the states involves two distinct problem areas. First, the preemption of state law by federal law disturbs the constitutional compact between these levels of government. Second, legislation in an area of evolving common law eliminates the flexibility of the system while retaining as many uncertainties and ambiguities as previously existed.

As I discussed previously, I am very concerned about federal intervention into an area that has traditionally been left to the states and which reflects the policy determinations of each state. This bill strongly tends to abrogate the stated intention of the President.

"It is my intention to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people."

Inaugural address by President Reagan (January 20, 1982). One of the proper roles played by the states has always been the formulation of standards for liability in tort which reflects a state's policy decision as to compensation of victims and as to deterrence. S. 44 overtly usurps this traditional state role in our constitutional scheme and intrudes into the areas of contract law, insurance law and evidence law as well. While the magnitude of this intrusion is more than sufficient justification for the rejection of this bill, I am even more concerned with the precedent it sets. Virtually no aspect of modern life is insulated from interstate movement. The future of our system of enumerated federal powers with all other powers reserved in the states would be in grave danger.

I am opposed to a legislative codification of tort liability standards in general and of product liability law in particular. The common law system is one which can develop and improve itself but is well-based in the stability of previous decisions. The stability coupled with flexibility is necessary for the law of products liability which is relatively new to the law in the modern form. I am quite disturbed by the prospect that this natural development may be halted if S. 44 is enacted. Further, the practical experience in areas such as FELA where legislation has replaced the common law has resulted in numerous inequities as well as severe hardship on the judicial system.

Question. S. 44 provides many new legal terms such as "practical technological feasibility" which are foreign to existing law. What guidance will this give courts charged with enforcing this law and would be the codification of these new terms contribute to consistency and uniformity in the law?

Answer. The infusion of the many new legal terms and standards in S. 44 will largely mutate the purported goals of consistency and uniformity in the law. Standards for the "state-of-the-art" doctrine exist in the states today. Interpretation and application of the term "practical technological feasibility" may well take on the characteristics of existing law. The desired uniformity will not be achieved and the United States Supreme Court will be left to resolve the differences. I do not believe that the Court will be able to do so. With the tremendous number of cases tried in the state courts and with the provisions precluding any new jurisdiction for the federal courts, the Supreme Court's burden will render the law ineffective or severely hamper the administration of justice by the Supreme Court.

Senator KASTEN. Justice Pope, we thank you very much for your participation here.

Our first witness this morning is the Honorable Jack Pope, conference of chief justices, chief justice, Supreme Court of Texas, Austin, Tex.

Mr. Pope.

STATEMENT OF HON. JACK POPE, CONFERENCE OF CHIEF JUSTICES, SUPREME COURT OF TEXAS

Judge POPE. Thank you, Senator.

I do appreciate this opportunity to appear. I appear this morning on behalf of the Conference of Chief Justices, and I want to assure you, Senator and the members of this committee and all of those who are for and against this bill that the chief justices, and the 2,000 judges in Texas of all levels, and all over the United States are just as interested in getting a fair solution to this problem as this committee.

Our concern and our only concern is what impact this will have upon the system. And when we look at that, we view the bill with dismay. It has no precedent. It usurps the judicial function. It disturbs many settled practices about which we are gathering up all of what has been called diversity. There is being achieved through the common law the uniformity that this bill in our judgment will destroy; this bill will create a diversity among 56 jurisdictions. Cases must be decided, and they can

only be ultimately decided by the U.S. Supreme Court, a court that is already overworked and overwrought.

It will destroy the developed common law in the whole range of tort reparations, and it will disrupt practices and procedures that many of us have worked for a lifetime in order to straighten out and to streamlime.

Now, I want to address some of the particulars of this bill, and just before I do that, I recall for all of us that less than a year ago I filed with this committee a written statement in which I stated, if given sufficient time, there will be a uniformity within the common law development; and I predicted that that would be accomplished before this bill was enacted, if it ever be enacted by the U.S. Congress.

I say to you that at least in my State and in the State of Missouri, we have come to that realization before the committee passed or approved the bill.

In the middle of last month in a case decided by the Supreme Court of Texas, we addressed this subject and the same problems; and in our written opinion, in the middle of the page, we wrote: "Judicial Trend Toward Comparative Fault." We then collected, as is the common law practice, the decisions of Alaska, and California, and Florida, and Montana, and West Virginia, and Wisconsin, who has been the leader in this, and New Jersey, and Kansas.

And we pitched—I say this with great respect—our comparative fault, so that the supplier, the manufacturer will not be treated unfairly; and he has been treated unfairly in the past. The chief justices are just as concerned about a fair system as anybody. And left alone, we will arrive at this favorable result before the Congress will act on this, and we will save, out of the wear and tear of all of this thing, things that are otherwise going to go down the drain, including the third branch of the State governments.

We relied in our written opinion upon some of our favorite writers and authors, and we quoted them to reach this harmonious result. We quoted Mr. Schwartz and Mr. Sales and Professor Wade. We believe in them, and we did what they said we should do. And what I am saying is we have achieved this harmony.

Now, there are many parts of this bill which—my time has already run out—that will require decades of construction such as, "practical technological feasibility." "Proximate cause" is used. It is not defined. "Superseding cause" is used. It is not defined. The preemption of other laws—I will pass over that.

But when we get down to sections 5 and 6, I advise you that there is the trick in this bill. There is the pea underneath the shell. If you will examine those, you will find that those provisions define everything so that something is or is not a defective construction or a design defect or a marketing or warning defect.

Defined into whether there is the defect are all of the defenses, so that you never get to the comparison. The party who is wronged and harmed, he has to submit issues; and I tried that on last night to see if a jury could understand an issue, because it has to be settled down in that jury theater. And I do not believe that a jury can understand this.

But what the bill does, if you will examine it—and now I am through—is that it puts all of this up into the definition of "defect". If there is no defect, the lawsuit is over. This is not a comparative fault bill.

[The statement follows:]

STATEMENT OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS

I am Jack Pope, Chief Justice of the Supreme Court of Texas. I sincerely thank the committee for this opportunity to speak about the working draft of October 19, 1983, of the product liability bill.

I appear at this time as the representative of the Conference of Chief Justices. I serve on the State-Federal Relations committee for that Conference. In its fall meeting, 1982, the Conference unanimously adopted a Resolution disapproving a federal product liability bill. That decision is still the decision of all of the Chief Justices.

The Chief Justices approach the notion of federal legislation in tort reparations matters with dismay. Our opposition is not oriented toward either plantiffs or defendants but is directed toward the preservation of our system of federalism as it applies to state judiciaries. The bill in our judgment usurps the judicial function of every state. The bill, if enacted, will disturb product law that is already uniform in important respects, and it will destroy the developed common law in the whole range of tort reparations. The bill will disrupt practices and procedures that have been simplified and will require every state to begin again. The bill will require decades of interpretation to unravel new concepts and new definitions in the over-detailed provisions of the bill. It is a massive intrusion by the federal government

upon the states. I shall respect your time and shall hurriedly focus attention on specific parts of the bill.

SECTION 2(4). "EXERCISE OF REASONABLE PRUDENCE"

This term is defined and superficially it comes across as rather familiar. Actually the definition in my opinion differs from the standard that is used in every state in the United States. I focus your attention upon the last clause, which says, "and judgment that society expects of its members for the protection of their own interests and the interests of others." This is novel and frightening. I frankly do not know what it means. It will be explained by many courts in many ways. The clause looks surprisingly like the community standard used in obscenity cases. If this be so, we really have no standard. I rather suppose that some courts will construe the clause to mean an industry standard.

SECTION 2(5). "EXPRESS WARRANTY"

A casual examination of this paragraph indicates to me that the bill is intended to supercede Restatement 402(b), and it will abolish strict liability in the case of false representations. I do not know, and we will not know until fifty-six jurisdictions start writing on whether the definition includes or excludes strict liability grounded on implied warranty.

SECTION 2(7). "MANUFACTURER"

Facially, this is another example of what appears to be fair, but let us examine it. A manufacturer is one who is engaged in business "to design or formulate and to produce, create, make, etc." This means that A can design a tank, airplane, or any other kind of equipment. A does not, produce, create, or make the tank from the design. An independent company B is the one who will produce, create, and make the products. Under the definition of the bill, neither is a manufacturer because neither meets both requirements. Neither would be liable as a manufacturer. This raises a further unanswered interesting question. If, in this instance, the act does not apply because there is no manufacturer, does the state law then apply?

SECTION 2(9). "PRACTICAL, TECHNOLOGICAL FEASIBILITY"

This is a new term that will produce varying applications. It is an unfamiliar term to those who deal with and study tort matters. Here again the phrase "capable of use in the manufacture of a product, and economically feasible for use by a manufacturer" suggests that the measure of safety will be that of the industry standard. Is it a safe one if everybody in the industry is careless or avoids knowledge. Are we then to say that the standard, by statute, is nevertheless one of uniform carelessness?

SECTION 2(10). "PREPONDERANCE OF THE EVIDENCE"

This term is enough like the one familiar to judges and the public, yet different enough to produce many, many interpretations and create diversity instead of uniformity. As an example, the definition starts off very will, but in Line 15 it adds "value of the aggregate evidence on either side." I do not know what that means. It means something and perhaps something different from usual definitions of the term or it would not have been used.

SECTION 2(12)(C)(21). "LEASES OF PRODUCT"

This section provides that a seller does not include a person who leases a product under a lease arrangement in which the selection, purchase, maintenance, and operations of the product are controlled by a person other than the lessor. We will have many instances in which a dummy company purchases and leases to a construction company or someone else and thereby immunizes all liability.

SECTION 2(14). "REASONABLY ANTICIPATED CONDUCT"

This section says that the term means "conduct which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." This is a change of our Texas definition of foreseeable misuse, and the provision probably limits one's duty to intended users. If so, one could put on every product the label "This product is intended to be used by trained workmen." This would immunize the supplier from liability.

SECTION 3. "PREEMPTION OF OTHER LAWS"

This act preempts state laws concerning express warranty cases, implied warranty cases, strict liability cases, negligence or gross negligence cases, rules of practice concerning the submission of special issues, instructions to jurors, and many rules of evidence. The act in part raises questions by its provisions that no jury trial will be permitted. Gross negligence is authorized by our Constitution in Texas so that body of law will be unsettled. The denial of a jury trial presents questions about violations of the 7th Amendment to the United States Constitution. Since the act supercedes state laws and provides that the district courts of the United States shall have no jurisdiction and requires all states to start from zero and begin over developing our procedures and interpreting the statute, the inevitable conflicts will have no place to go except to the United States Supreme Court. That court is already overworked and overwrought. It will be impossible for that court to grant enough writs to settle the myriads of problems that this act will generate for decades.

The reach of the harm to state systems extends far beyond the mere trial of products liability cases. States cannot, consistent with sound administration of justice, judicial economy and justice, have one set of rules to try products liability cases and a different system to try an ordinary negligence case or a malpractice case. Even the joinder of a physician in a products liability case concerning his administration of defective drugs, will require two different systems of trial and submission to the jury or a complete overhaul of our state tort systems.

SECTION 4(2). "PROXIMATE CAUSE"

The section states that a manufacturer is liable if the claimant establishes certain things stated in Section One and also that the unreasonable dangerous aspect of the product was a "proximate cause of the harm complained of by the claimant." Most states are familiar with the phrase, "producing cause," in products liability cases. Proximate cause has different meanings and a well defined meaning in Texas. Does this mean "cause in fact" or does it mean "foreseeable cause"? The provision creates problems that presently do not exist.

SECTION 5(A)

Section 5(a)(1) states that a product is unreasonably dangerous if it deviates in a material way.

"(1) from the design, specifications, formula, or performance standards of the manufacturer."

Does the manufacturer set his own standards whether they be good or bad? Do we penalize the ultra careful manufacturer even though his standards may be far above those of all others?

Section 5(b)(1) and the remaining part of Section 5 are a wholesale and gross assault upon the body of tort law. Whereas strict liability applies to Section 5(a)(1), everything following 5(b)(1) concerning design is grounded on negligence. This is confusing and the long, intricate provisions are loaded with complex sections that will require years of interpretation before it is sorted out. I count at least eight separate interrogatories or special issues that must be submitted to determine the simple question whether it is a design defect. The section requires a claimant to prove affirmatively:

"(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

"(B) a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used."

A claimant, after making that proof, apparently must then submit inferential rebuttal issues and obtain findings on three additional facts. He must first prove that there is a defect, and then he must overcome three items that the act says "do not constitute an unreasonably dangerous design defect."

This injects a very bad practice into jury trials. We once had inferential rebuttal issues in Texas and found that juries could not understand them. The act's definitions and the statements of what must be proved create such a proliferation of issues that the practice will not work in the jury theater. This is a backward step. One must ask juries to weave their way through too many issues and problems. The act defines a claimant out of court. Is that the purpose of the act?

SECTION 6. "PRODUCT WARNINGS OF INSTRUCTIONS"

This section consists of five more pages of intricate definitions and instructions which will be difficult for a jury to handle. Section 6(d), like Section 5, requires additional inferential rebuttal issues.

Section 6(e)(1) provides that a product is not unreasonably dangerous for lack of warnings regarding dangers that are obvious. Jurisdiction that have been caught in the "open and obvious" net have had to reject the phrase. It has multiple meanings and many interpretations. It can mean that a state of facts is established as a matter of law. It can mean that a fact issue is raised. Texas and most states rejected it as a spurious issue that is subsumed under such terms as negligence, contributory negligence, and as an expression about the state of the proof.

The section circumscribes the duty of the manufacturer for reasons that are difficult to understand. Hardly anything is cheaper than giving a warning or pasting on labels.

This bill is not a comparative fault bill. Sections 5 and 6 concerning definitions of product construction and design and product warnings or instructions expose the nature of the bill. Up to this point, the bill has not even addressed comparative fault. Comparative fault determines the percentage of fault on the part of plaintiff and defendant and fixes a percentage chargeable to each. Sections 5 and 6 in their definition of defects, designs, and warnings cut off and defeat the claimant at that stage before he ever submits the comparison. The intricate definitions cut off the claimant so that the comparison would be hard to reach.

There are specific problems with many other sections, but I shall leave it to others to mention them. I do mention, however, Section 9(f) wherein it speaks of "superseding cause." That term like "proximate cause" is undefined.

"PUNITIVE DAMAGES"

The section on punitive damages proceeds upon the basis that one should have two trials even though one is enough. Section 12(a)(1) requires a trial on liability and compensatory damages. It requires a second trail on punitive damages. This provision is consistent with the entire bill in that it makes complex that which has been simple. It imposes additional trials upon our courts. The provisions concerning punitive damages provide that the court, not a jury, shall make findings of fact. This too presents right-to-jury constitutional questions.

The act authorizes a one time assessment for punitive damages. Section 12(g) stays all punitive damages after the first is paid; it also stays a trial court from proceeding with his docket. Spelled out, I believe this means that punitive damages for $5,000 on the first Pinto accident would have been full and final payment in future punitive damages cases.

The Trust Fund Doctrine will require judges to preside over Punitive Estates that may never be closed. The concept is very interesting.

Finally, I suggest that a federal comparative fault bill is not needed. I filed with this committee about a year ago a statement in which I said that any problems we were having in Texas would probably be resolved before Congress enacted this bill. On February 18, 1984, the Supreme Court of Texas unanimously adopted the concept of comparative fault in products liability. *Duncan* v. *Cessna Aircraft Company*, 27 Tex. Sup. Ct. J. 213. We adopted the system after examining and deciding to follow the lead of a multitude of common law decisions. Those included decisions from California, Florida, New Jersey, and Wisconsin, a state that has been a leader in this whole development of the law. A plaintiff under *Duncan* who asserts a claim against a manufacturer or supplier is responsible for all of his own contributory negligence, misuse, alteration and fault, and his percentage of fault is subtracted from any damages. The system developed in Texas and all of these other states is simple to manage and they are uniform with each other. Legislation, more than anything else, has been the complicating factor.

On November 22, 1983, in *Gustafson* v. *Benda*, 661 S.W.2d 11, the State of Missouri joined this group of states. This too was done through the common law and not by legislation. Missouri by judicial decision adopted the Uniform Comparative Fault Act.

We would hope that the goal to achieve fairness through comparative fault in products cases and a feasible uniformity will be ongoing. We respectfully suggest that we are reaching those goals in a manner that is achieving an orderly development of the law in each state without the disruption of our court systems.

Senator KASTEN. Thank you, Judge Pope.

I would like to explore with Chief Justice Pope the issue of the question of sections 5 and 6, particularly the products construction and design relative to these as

from a viewpoint of a judge in a lawsuit. Would you give us the problems that may be confronting a trial judge relative to the issues as they have been written and drafted here?

Judge POPE. Thank you, Senator Heflin.

I had the honor to serve on the trial bench, and I have been very active for a lifetime in an effort to simplify trials, and I think we have achieved that in Texas, and as an example, if you will turn to section 6, we are going to have a jury determine whether or not there is a failure to warn so as to constitute what, for lack of a better name, I will call a marketing defect, and this is the process by following the exact words of this bill that this will be transmitted from the judge and from the lawyers and from the witnesses over the jurors.

The first special issue under 6(b)(1) is: "Find from a preponderance of the evidence whether the manufacturer knew" and so forth, and I will leave that. The second issue: "Do you find that the manufacturer failed to provide the warnings * * *" The third issue is: "Do you find that the warnings would have led to an avoidance," etc. Now, you would think that if a claimant, a consumer, discharges those things, he would have made out a case for a "defect". He is a long way from being through, and this bears out what I said in my opening statement, that there is build into the definition all of the defenses.

Now, I am going to pass over pages 15, 16, and 17, which will also include some additional issues, so I can get down to just what kind of an impact we are going to make upon the jury with a mass of issues that are loaded. Now, look at 6(e)(1). We come to this issue: "Do you find from a preponderance of the evidence that the danger—describing it—was not obvious to the plaintiff consumer?" Now, that is what we call the old open and obvious. It is a sham issue. It is a false issue, and it has been abolished because even professors and scholars cannot understand what it means. But anyway, we are now going to help the jury by giving them instructions to answer the issue. We are going to make it as clear as we can to the jury, because we are going to follow the exact words of the statute.

Now, gentleman of the jury, a reasonable danger means and includes the magnitude of the danger of which a project user in the course of reasonably anticipated conduct of a person would have been aware without a warning, and danger includes the magnitude of the dangers which are a matter of common knowledge to persons in the same or similar position, and unreasonable danger also means the consequences of product misuse where the does not constitute reasonably anticipated conduct.

And, gentleman of the jury, unreasonable danger also means the consequences of product alterations or modifications where the alteration or modification does not constitute reasonably anticipated conduct.

Answer "yes" or "no."

To which the jury will answer, "huh?" What I am saying is that this cannot be handled by jurors. What we have done in this bill is to put the usual burdens upon the plaintiff and then we impose upon the plaintiff the extra burden to negate what we call in law inferential rebuttal issues. What that means is, the plaintiff must negate no duty. This is all very clear, I am sure; but this is what we have to ask the jurors to do. The jurors cannot handle it.

And, Senator, would you permit me to use the rest of your time?

Senator KASTEN. Judge Pope, why do you not in about 30 seconds complete your statement?

Judge POPE. Well, it relates to another thing, but I just wanted to give another example. If we cannot agree on implied warranties, 50 States cannot agree upon them, but look at section 2(7) that defines "manufacturer." I think this has escaped everyone. A "manufacturer" is one who is engaged in business "to design or formulate and to produce, create, and make."

Now, what this means is that A can design a chain saw, A can design it, and then B can construct it, and neither one of them is a "manufacturer." They both wholly escape. I do not think that this is what the committee intended, but under this kind of a statute, the manufacturer—there may be no manufacturer. One designs it, and he does not make it. To me that is an unfair provision, and I do not know what the ruling will be. If there is no manufacturer under this act, then do we fall back upon the State law? Twenty years from now the U.S. Supreme Court will probably answer that question for us.

Senator KASTEN. The next witness is Mr. Roland Banks from Portland, OR.

Mr. Banks.

Mr. BANKS. Thank you, Mr. Chairman. I am a trial lawyer, but I am not a plaintiff's trial lawyer. I specialize in the defense of product liability claims. I have been doing that since about the early 1960's, and as such, I practiced through and I have seen the evolution of product liability law in this country and the situation it is in today.

I am here to express my own personal views, and I am just here on my own behalf to express my own views as to the need of Federal legislation in this area and to specifically urge the passage of S. 100.

I think it might be helpful for me to share with you how I arrived at my present position in favor of Federal legislation. For the last 10 years I have been an active member of the Product General Liability and Consumer Law Committee of the American Bar Association. I served as the vice chairman on that committee for 7 years, and I was chairman in 1982 and 1983. That is the committee—one of the committees in the American Bar Association which concerns itself with substantive law on product liability.

In 1979 I was the vice chairman of the committee that was in charge of legislation. It was in 1979, you may remember, that the Department of Commerce issued its Uniform Model Product Liability Act for voluntary use by the States. We were asked to review that act and study the question of whether it should be Federal law or whether it should be, as the Department of Commerce indicated, only applied for the voluntary use of the States.

As a member of that committee I urged, as did the rest of the committee, that the ABA take a position against that act as a Federal law and that that act be referred for use by the States. I continued as legislative chairman of that committee for several more years, and I watched, as did our committee, the fact that the model act was getting nowhere in the States. As a matter of fact, the States were passing their own laws and had passed them prior to the model act that were very varied and different, just as their court-made law was varied and different. We not only had a quilt approach to product liability court-made law, but we had it by way of statute as well.

Late in 1981 your staff came out with a draft of a proposed new Federal law which was the forerunner of S. 100. I was again asked to be on an ABA committee to review that piece of legislation and to determine whether the ABA should continue its position opposing Federal legislation. I was one of two people who voted that the ABA should change its position and not oppose Federal legislation. That is a 360-degree turn in my own position on the matter, and I would like to share with you the analysis that I went through that caused me to change my mind.

I first asked the question whether product liability should be controlled by legislation at all, or should it be left to the courts. Some, such as the American Trial Lawyers Association, believed that the principles of liability for product-related injuries should not be legislated at all, as the Lieutenant Governor from Illinois indicated. They oppose Federal legislation and say it should be left to the States, but when the legislation is introduced in the States, they oppose it there as well.

The answer to this question gets back to the debate that was first addressed by the Department of Commerce Interagency Task Force on Product Liability. If one feels as I do, and as the Interagency Task Force did, that the court-made rules in the product liability field have created a real economic problem which the courts will not solve, then you have decided that legislation is needed to stabilize the situation, and you proceed to the second question.

The second question is whether the product liability legislation should be at the State or at the Federal level. I have always considered myself quite conservative, so I do not normally endorse Federal legislation to answer a particular problem. This is probably why I felt the way I did in 1979 when we were looking at the model Act. At this time, however, I think one must decide whether the issue is a local issue or one of national concern before answering the second question.

I have reluctantly concluded that the product liability problem is not a State-by-State issue, but is rather one of national concern. In other words, as I see it, this is not a States' rights issue. The issue is not like automobile law or malpractice where the alleged tort feasor acts in one State and creates harm in the same State. Here the product is produced in one State and is sold and can produce harm in numerous, if not all States. The situation is more analogous to railroad and admiralty torts where Federal legislation has already been accepted. It is a national problem, and it should be solved by legislation, and only national legislation will work.

I would like to make a few comments concerning S. 100. I believe the product manufacturer should be judged in accordance with the principles of negligence, just as doctors, lawyers, engineers, architects, contractors and everyone else in our society is judged. That is what this bill does.

Principles of strict liability, no matter how they are defined by the courts, were developed in the early and middle 1960's to remedy a situation where the manufacturer could not be reached by the ultimate consumer or where the ultimate consumer could not get sufficient information concerning the methods used in the manufacture.

That situation does not exist today. Manufacturers are clearly reachable by principles of negligence. Present-day discovery allows injured parties to discover everything there is about the ins and outs of the decisions of the manufacture connection with his product.

In conclusion, Federal legislation is needed to stabilize and uniform the applicability of product liability law in this country. S. 100 is an excellent proposal to do so, and I urge its passage.

[The statement follows:]

STATEMENT OF ROLAND F. BANKS, JR.

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to appear before you today. I am Roland F. Banks, Jr., also known to some as Jerry Banks. I am a trial lawyer from the State of Oregon. I specialize in the defense of product liability actions, and I have done so since the early 1960's. As such, I have seen and lived through the evolution of product liability law up to the situation as we know it and practice it today. I am here today to express my views on the need for federal legislation in the area of product liability law and to specially urge the passage of S. 100.

I think it would be helpful for me to share with you how I arrived at my present position in favor of federal product liability legislation. For the last ten years I have been an active member of the Products, General Liability and Consumer Law Committee of the Torts and Insurance Practice Section of the American Bar Association, having served as vice-chairman of the committee for seven years and as chairman during 1982 and 1983. That is the committee in that section which concerns itself with the substantive law of products liability. In 1979, I was the vice-chairman of the committee that headed the legislation subcommittee. It was in October of that year that the United States Department of Commerce published, in the Federal Register, the Model Uniform Product Liability Act, which it offered for voluntary use by the states. This followed that department's Inter-Agency Task Force on Product Liability's Final Report, which found that the instability and lack of uniformity of the court-made product liability rules was a major economic problem in this country. As opposed to other tort areas such as automobile liability, general liability and malpractice liability, which are governed by negligence principles that are relatively stable and uniform from state to state, product liability law was in a constant state of flux and varied dramatically from state to state. The purpose of this proposed model act was to stabilize and make uniform this law by state legislation. The act was also introduced into Congress, however, as a proposed federal law.

At this point, our legislative subcommittee was asked to study the model act and make recommendations to the section concerning whether the American Bar Association should take any position on the model act. Our conclusion, with which I then agreed, was that the ABA should oppose efforts to make this a federal law and instead, encourage its voluntary use by the states as proposed by the Department of Commerce. This recommendation was eventually adopted by the ABA at its mid-year meeting in 1981.

I continued as chairman of this legislative subcommittee, and we monitored the situation concerning legislation in the states from October, 1979 on. Basically, the model act was getting nowhere. Instead, many states, seeing the need to stabilize the law, were adopting their own different legislative approaches. Some had passed laws even before the model act was published. Now, we had not only a guilt approach to product liability court-made law from state to state, we had it as well by state statutes, which varied all over the lot.

Late in 1981, the staff of your committee published a draft of a proposed new federal law, which was the forerunner of S. 100. It was similar, but also quite unlike, the model act. One of the major differences is that it defined liability of product makers in terms of negligence, just as liability for others in our society is defined. This was proposed so as to correct the obvious inability and lack of desire on the part of the state stabilize and make product liability law uniform. In light of this proposal, the Tort and Insurance Practice section of the ABA decided to reexamine the federal approach to the problem. A four-person committee was appointed to review the matter. The committee ended dead-locked on the question 2 to 2, so no report was given to the ABA recommending a change of its position.

I was one of those four persons, and I was one of the two that voted to withdraw the ABA's opposition to federal legislation on product liability—a 360° change from my view two years earlier. How did this happen? Here is the analysis that I went through.

I first asked myself the question whether product liability should be conrolled by legislation or left to the courts. I consider this really the threshold question. Some, such as the American Trial Lawyers Association, believe that the principles for liability for product-related injuries should not be legislated at all. They oppose such legislation whether it is at the state level or federal level. When speaking on the question of federal legislation, they all often state that the matter should be left to the states, but as a practical matter, when legislation is offered at the state level, they oppose it there too. I believe that the main opponents to changing the ABA position are really of this mind, even though they use this state's rights argument as the basis for their support of an anti-federal legislation position.

The answer to this question gets one back to the debate which was addressed by the Inter-Agency Task Force On Product Liability's Final Report. If one feels, as I do and as the Inter-Agency Task Force did, that the court-made rules in the product liability field have created a real economic problem, which the courts won't solve, then you have decided that legislation is needed to stabilize the situation and you proceed to the second question.

The second question is whether the product liability legislation should be at the state or federal level. I've always considered myself fairly conservative, so I do not normally endorse federal ligislation to answer a particular problem. This is probably why I felt as I did in 1979 when we were looking at the model act. At this point

in time, however, I think one truly must decide if the issue is one of local or national concern before answering this second question. I have reluctantly concluded that the product liability problem is not a state-by-state issue, but is rather one of national concern. In other words, as I see it, this really isn't a state's rights issue. The issue is not like automobile law or malpractice, where the alleged tort-feasor acts in one state and commits the harm in that same state. Here, we have a product that is produced in one state, but it is sold and can produce harm in numerous, if not all, states. This situation is much more analogous to railroad or admiralty torts, where it is already accepted that legislation is appropriate and that that legislation should be at the federal level.

As I pointed out before, efforts have been made to address this problem on a state-by-state basis, but it hasn't worked, primarily because those states that have legislated have done so in a divergent manner, and the largest and most important states haven't acted at all. The result is that citizens of states which have addressed the problem are still paying the increased costs of products due to manufacturers' losses in large states that have declined to interfere with the courts. It is a national problem and, if it is to be solved by legislation, only national legislation will work.

Now I would like to make a few comments concerning S. 100. I believe that product manufacturers should be judged in accordance with principles of negligence, just as doctors, lawyers, engineers, architects and all other members of our society are judged. That is what this bill does. Principles of strict liability, no matter how they are defined by the various courts, were developed in the early and middle 60's to remedy a situation where manufacturers could not be reached by the ultimate consumer or injured party. They were also developed because of problems injured parties had in discovering information concerning the manner in which the product was designed and manufactured. That situation no longer exists. Manufacturers of products are clearly reachable by the injured party under principles of negligence. Present day discovery allows an injured party to discover everything there is about the ins and outs of the decisions of the manufacturer in connection with his product. On balance, it seems to me that the provisions of S. 100, by reason of the compromises that have been obtained over the last three years, is an equitable and a fair law to the consumers and the manufacturers alike. There are provisions in the bill that I do not like, but I am willing to accept them in the spirit of this compromise. For example, I do not like the punitive damage provision in the bill because I am generally against the recovery of punitive damages in tort litigation. I think this matter should be left to the criminal system, rather than to allow one injured person to receive a windfall recovery. Also, I think that the statute of repose provision being limited to capital goods and a 25-year period is too restrictive. In Oregon, we have a statute of repose which is eight years from the date of first use or consumption. Other states have 10-year or 12-year provisions. These seem more reasonable to me, but I will accept the proposed federal limitation in order to get more fair and stable rules concerning liability.

In conclusion, federal legislation is needed to stabilize and uniform the application of product liability law in this country. S. 100 is an excellent proposal to do that. It is a good compromise between the consumer and industry. It protects the consumer's rights and gives the industry the stability it needs.

Thank you, Mr. Chairman, and members of the subcommittee, for permitting me to present my views.

[The following information was subsequently received for the record:]

AMERICAN BAR ASSOCIATION,
Washington, DC, March 20, 1985.

Hon. ERNEST F. HOLLINGS,
Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR HOLLINGS: Your office called to our attention the testimony of Roland Banks to be presented at product liability hearings before your Committee's Subcommittee on Consumer on March 21, 1985.

In his testimony, Mr. Banks states that, in late 1981, a four-person committee was appointed by the ABA's Section of Tort and Insurance Practice to reexamine the position of the ABA on broad federal product liability legislation and that "the committee ended deadlocked on the question 2 to 2, so no report was given to the ABA recommending a change of its position." This statement may create an improper impression that this committee was the principal ABA entity which studied the issue and that its split reflects a proportionate split within the Association on this issue.

The American Bar Association's House of Delegates and Board of Governors are the policy-making bodies of the Association. In the case of the broad product liabil-

ity legislation, our House of Delegates has acted twice, once in 1981 and again in 1983, and in both instances the House voted by a heavy majority to oppose broad federal legislation.

The matter of the four-person committee mentioned by Mr. Banks was the subject of questions addressed to ABA witness Ernest Sevier when he testified before your Committee on March 12, 1982. I enclose the relevant pages from the printed record of hearings for that date. Mr. Sevier noted that the committee was a subdivision of the Section of Tort and Insurance Practice; that as such it had no authority to issue policy statements on its own but only to make recommendations to the Council of the Section; that Mr. Sevier, as Chairman of the Section, had appointed the committee with the intention of having it be a balanced committee which could fairly present both sides of the issue to the Council for its consideration; that the committee members made a lengthy oral presentation to the Section Council; and that the eighteen members of the Council voted unanimously to oppose the federal legislation.

In April 1983 hearings before your Subcommittee on this same issue, Mr. Sevier, again representing the ABA, reported to your committee that the ABA's policy-making body, the House of Delegates, in February 1983, "reaffirmed the wisdom of leaving the great majority of products liability case law to the various states which are in a position to best address themselves to the specific social and economic needs of their constituents." As he stated, this was done only after the House of Delegates had studied an extensive report of a Special Committee authorized by our Board of Governors and appointed by our then-President to study the matter and make recommendations to the House of Delegates. Enclosed is a copy of our written statement from the April 1983 hearings that discusses in great detail how our February 1983 position was adopted.

I hope that this information clarifies that only the House of Delegates' actions in 1981 and 1983 constitute official policy statements by either the Association or any of its entities on this subject.

Sincerely,

ROBERT D. EVANS.

Senator KASTEN. Mr. Banks, we thank you for your testimony. As you are aware, we have an individual representing the ABA.

Mr. BANKS. I am not representing the ABA. I made it clear I was here on my own.

Senator KASTEN. I appreciate you sharing with us the process that you went through in terms of determining your position.

Our next witness on this panel is the Honorable Jeffrey Teitz, who is a Representative from the State of Rhode Island. And you are here on behalf of the Justice Committee of the National Conference of State Legislatures. You are also an attorney. Is that a trial lawyer?

Mr. TEITZ. Yes. I am here on behalf of the entire National Conference of State Legislatures, Mr. Chairman.

Senator KASTEN. You are not speaking on behalf of the ABA or Trial Lawyers Association.

Mr. TEITZ. No, I am not, Mr. Chairman.

Senator KASTEN. Representing the Justice Committee of the National Conference of State Legislatures, Mr. Teitz.

Mr. TEITZ. Thank you for the opportunity to speak on the product liability issue today.

My name is Jeffrey Teitz, and I am here today as a representative of the National Conference of State Legislatures. NCSL is the official representative of the Nation's 7,400 State lawmakers. I have been a member of the Rhode Island House of Representatives for 13 years, and I served as chairman of the Rhode Island House Judiciary Committee for the last 7 years. During much of this time I have been active in NCSL, and I currently serve as chairman of its Law and Justice Committee.

This is my second opportunity to speak to the subcommittee on behalf of NCSL about an issue that is of tremendous concern to legislators across the country. Our organization encompasses legislators of every philosophical persuasion and political affiliation, and includes many spokesmen for the needs of the business community as well as consumer advocates.

What unites us in opposition to S. 100 transcends the issue of products liability itself. What unites us is our common desire to preserve the vitality of the Federal system. We honestly believe that the sweeping preemption of State tort law proposed in this bill would fundamentally alter the relationship between the States and the National Government. We can think of no precedent for this proposal which would nationalize an entire segment of the civil law in our States. We are aware of no comparable attempt to impose one set of evidentiary standards and rules of procedure on 50 unique State court systems.

And let me add that we as State legislators are not alone in this concern. We are joined in opposition to this legislation by the Association of State Attorneys General, by the Association of State Court Judges that you have heard this morning, and by the National Governors' Association. And I have been asked by the National Governors' Association to read to the committee a letter from Governor Richard Riley, acting on behalf of the association as chairman of its Committee on Criminal Justice and Public Protection.

[The letter follows:]

DEAR MR. CHAIRMAN: I am writing once again to express the firm opposition of the National Governors' Association to legislation to establish a uniform product liability law. S. 100, the new bill, is before your committee this week, and I urge you to oppose it.

The proposed legislation would preempt State law and substitute generally weaker Federal standards. There is simply no justification nor has there been any evidence for the need of preemption of traditional State authority in this area.

Nobody would deny the tremendous complexity of product liability law or that standards do vary between states. But these facts alone do not create a convincing case for Federal preemption of State activity in this area. Product liability law has developed through a cautious, deliberate process reflecting the gradual adaptation of the law, to changing concepts of justice and social responsibility. In an extremely complex and controversial area of the law, the diversity represented by product liability doctrine developed in State jurisdictions can be considered a strength rather than a weakness.

Therefore, the nation's Governors see no need for preemptive Federal product liability legislation.

Sincerely,

GOVERNOR RICHARD W. RILEY,
Chairman, Committee on Criminal Justice and
Public Protection of the National Governors Association.

NCSL opposes the Products Liability Act for similar reasons, because it constitutes an unjustified and unprecedented preemption of State laws affecting the fundamental legal rights of our citizens. It would radically change the statutory and common law presently being applied in most States to protect the public from unsafe products.

While the stated goal of S. 100 is a uniform set of rules governing the liability of manufacturers, the drafters have, in effect, ignored the rules presently enforced in a large majority of the States. In its most important provisions, this bill would overturn the

common law consensus that has been reached in the States and substitute one less favorable to the victims of defective products.

During the last two decades, 46 States have adopted a strict liability standard in product liability cases. Courts and legislatures throughout the country have recognized that such a rule serves both to encourage manufacturers to produce safer products and to provide compensation for persons who through no fault of their own are injured by unreasonably dangerous products.

S. 100 would require the States to impose a more lenient standard on the manufacturer in design defect cases, which are the most serious product liability cases. The proposed legislation would as well require that a manufacturer not be held to the traditional standard of responsibility for all foreseeable uses of his product, but a lesser standard. In the areas of statutes of repose and in the areas of punitive damages, this statute similarly cuts against the established pattern of the law in the States.

I would like to say in conclusion, Mr. Chairman, that to the men and women of this Nation's State legislatures, federalism is much more than an argument to be raised when one does not like the particular provisions of a bill. It is the way that people from communities with very different cultures and economies can all live under laws which reflect their traditional values. It is a principle which transcends the momentary desire of one economic group or another in our society for a quick fix to its perceived problems. We sincerely hope that the members of this committee and the entire Senate view federalism the same way. Thank you.

[The statement follows:]

STATEMENT OF STATE REPRESENTATIVE JEFFREY J. TEITZ, CHAIRMAN OF THE RHODE ISLAND HOUSE JUDICIARY COMMITTEE

Mr. Chairman, thank you for this opportunity to speak on the product liability issue.

My name is Jeffrey Teitz and I appear today as a representative of the National Conference of State Legislatures [NCSL]. NCSL is the official representative of the over 7,000 lawmakers serving in State, territorial and commonwealth assemblies.

I have been a member of the Rhode Island House of Representatives for 13 years and served as chairman of the House Judiciary Committee for the last 7 years. For many of these years I have been active in NCSL and currently serve as chairman of the NCSL Law and Justice Committee.

This is my second opportunity to speak to this subcommittee on behalf of NCSL about an issue which is of tremendous concern to legislatures across the country. Our organization encompasses legislators of every philosophical persuasion and political affiliation. It includes many spokesmen for the needs of the business community as well as consumer advocates. What unites us all in opposition to S. 100 transcends the issue of product liability. What unites us is our common desire to preserve the vitality of the federal system. We honestly believe the sweeping preemption of State tort law proposed in this bill would fundamentally alter the relationship between the States and the national government. We can think of no precedent for this proposal which would nationalize an entire segment of the civil law in our States. We are aware of no comparable attempt to impose one set of evidentiary standards and rules of procedures on 50 unique State court systems.

NCSL opposes the Product Liability Act because it constitutes an unjustified and unprecedented preemption of State laws protecting the public from unsafe products. It would radically change the statutory and common law presently being applied in most States. While the stated goal of S. 100 is a uniform set of rules governing the liability of manufacturers of defective products, the drafters have ignored those rules presently in force in a large majority of States. In its most important provisions, the bill would overturn the common law consensus that has been reached in the States and substitute one less favorable to the victim of the defective product.

During the last two decades, 46 States have adopted a strick liability standard in product liability cases. Courts and legislatures throughout the country have recognized that such a rule serves both to encourage manufacturers to produce safer products and to provide compensation for persons who, through no fault of their own, are injured by unreasonably dangerous products. S. 100 would require the States to impose a more lenient standard on the manufacturer in design defect cases, which are the most serious products cases.

A majority of the States have concluded that the present standard of strict liability has served the public interest well. It has led to the exposure of unreasonably dangerous products and led to their removal from the market. The exploding gas tank, flamable fabrics, pills that cause strokes and cancer, and tampons that cause toxic shock syndrome are all examples of design defects. S. 100 would make it much harder to hold the manufacturer responsible in such cases.

The proposed legislation also tampers with the doctrine of joint and several liability, which is nearly universally applied by the States in torts cases. Changing this rule for product liability cases will create endless confusion in multiparty litigation involving both defective products and unrelated claims. For example, consider a suit against a driver of an auto and the manufacturer or a suit against both a doctor and a drug company, furthermore, S. 100 mandates new standards for the admissibility of evidence such as its provision of subsequent remedial measures. These unique evidentiary rules will result in certain key facts being admissible in the trial of the unrelated claim but inadmissible in the trial of the product liability claim. This bill will make it virtually impossible to resolve such cases in a single trial.

In most jurisdictions, a manufacturer is responsible for all foreseeable uses of his product. Under this proposal, states would be prohibited from imposing this traditional standard of care on manufacturers.

Most states will allow for the imposition of punitive damages when the proven conduct of the manufacturer evidences a blatant disregard for the consuming public. In the majority of those States, whether to award punitive damages and the amount of punitive damages is a jury question. The decision to place that responsibility with jurors is deeply rooted in the jurisprudential tradition of those states. S. 100 would deny States the right to allow jurors to decide the size of punitive damage awards.

The majority of States do not presently have statutes of repose limiting the right to initiate product liability suits. The State supreme courts in five States where statutes of repose were enacted have ruled them unconstitutional. One such State is my home State of Rhode Island. The courts have held such provisions are unconstitutional because they arbitrarily cut off legitimate causes of action before they even accrue. In other words, statutes of repose completely bar a person injured by a defective product from commencing suit merely because that product has been on the market more than an arbitrary number of years. This has been found to violate State constitutional provisions which guarantee the availability of a judicial remedy for every tortious injury. Despite these State supreme court rulings, S. 100 proposes a national statute of repose which will totally bar citizen access to State court based upon the age of the defective product.

As I emphasized at the beginning of my remarks, the proposed legislation would radically alter the present law in a clear majority of States. Why does S. 100, which justifies an unprecedented preemption of State tort law in the name of uniformity, ignore the overwhelming consensus of State law on the important issues I have cited. By overturning the dominant legal doctrines presently being applied in product liability cases throughout the country, this legislation would multiply rather than eliminate confusion. Therefore, S. 100 would trample time honored principles of federalism for no justifiable purpose.

Now, let me say a few words about how the preemption contemplated by S. 100 relates to some larger questions regarding the vitality of our Federal system and the role of Congress as a guarantor of our Federal system.

Only last month, in the case of Garcia v. San Antonio Metropolitan Transit Authority, the United States Supreme Court reaffirmed the primary responsibility of Congress to protect the States from intrusions into their traditional domain by the Federal Government. The court cited James Madison's assertion expressed in the federalist papers that the composition of Congress and particularly of the Senate was designed to imbue the national legislature with "the spirit of the States" and to make it "disinclined to invade the rights of the individual State or the prerogatives of their governments." The justices therefore concluded that Congress must serve as "the fundamental limitation that the Constitution imposes on the commerce clause to protect the States as States." We at NCSL strongly urge the members of this committee to fulfill this historic role in your deliberations on S. 100.

While you are leaders of the national Government, you are also representatives of your States and in a very real sense their ultimate protectors. If you give in to the call for preemption of State action each time the argument of economic efficiency is advanced, the States will soon be nothing more than administrative units of the national government. The very concept of federalism suggests there are higher values than uniformity. The preemption proposed by S. 100 is not a minor intrusion upon the traditional jurisdiction of the States. It would mandate national evidentiary standards and rules of procedures for every court, in every county, in every State throughout the land. Please remember that federalism is the means by which we, in a nation of more than 200 million people, provide for a significant degree of citizen participation in decision making. It is the way that people from communities with very different cultures and economies can all live under laws which reflect their traditional values.

To the men and women in this Nation's State legislatures, federalism is much more than an argument to be raised when you don't like the provisions of a particular bill. It is a principle which transcends the momentary desire of one economic group or another in our society for a quick fix to its perceived problems. We sincerely hope that the members of this committee and the entire Senate view federalism the same way.

Senator KASTEN. Next witness is Marshall Shapo, who is the professor of law at Northwestern University appearing on behalf of the American Bar Association.

Mr. SHAPO. Thank you, Mr. Chairman.

I believe a statement has been submitted for the record.

I am Marshall S. Shapo, and I am the Vose professor of law at Northwestern University. I think it is time to take the hot air out of this balloon.

My titular reason for appearing today is that I served from 1980 through 1984 as reporter for the special committee on the Tort Liability System of the American Bar Association, but I appear, even as I acted as the special committee's consultant, as an independent scholar. I have taught tort law for 20 years. I have written and edited several books on the subject, including the coeditorship of the first casebook on products liability.

The report of which I speak deals with product liability, but only as part of a much broader inquiry. Indeed, the charge under which the special committee operated was one that requested it to identify the strengths and weaknesses of our tort law system viewed whole, and to suggest improvements in the system.

The very first sentence of the report says that "So far as we know, there is no word in the Bible for torts." Yet the extraordinary body of law that now goes under that label has embraced a wide range of injuring events where the law has deemed it just to require compensation from persons whose acts or omissions can fairly be said to have caused injuries.

In that vast background of law, products liability law represents a response to complex social needs: the need to deal with our extraordinary technological progress, to respond to sophisticated sales techniques of an age of electronic media, and to deter the sale of products which are unreasonably dangerous to consumers and others who encounter those products.

In providing these necessary responses, our tort law operates through a process that for all its faults is a splendid tool for achieving the justice which is its goal and often its hallmark. That process is case-centered, incremental, and requires articulately reasoned judgment by professional decisionmakers against a back-

ground of precedent. It also has historically drawn principally on that great reservoir of our common law, the State judiciary.

This brief characterization of some of the main features of our tort law will imply an outline of the case against this proposed statute. By substituting political horse trading for reasoned decisionmaking, such a statute would undercut the rational process of common law jurisprudence, which is I think a point implicit in Senator Gorton's question to Victor Schwartz.

By federalizing this historically State area of the law, Congress would substitute a political judgment for the cross-country conversation among many courts that has developed through time and reasoned dialogue a national body of law with its roots where they ought to be: in the States.

In attempting to cast a single mold of doctrine, a bill of this sort would generate even more interpretive swamps, predictably producing more rather than less litigation.

Mr. Chairman, you introduced the hearing, I believe I have the language exact in relevant part, by characterizing the bill as legislation that would establish a uniform products liability law in the United States. It is likely that the history of this bill become law would mock that statement.

I would emphasize, moreover, that if Congress truly finds it necessary to act on this problem, it should not use an elephant gun where a rifle will do. It would seem much more sensible to identify a few principal causes of the problem and to institute two or three specific reforms that deal with those causes.

What I have just said: "if Congress truly finds it necessary to act"—brings me back to the heart of the objection. The other day my hometown paper quoted an unnamed Senator as saying that Congress' plate was full with four things. As I remember them, they were Central America, the Mideast, the MX, and the budget.

It seems to this relatively apolitical professor especially odd that in the rushing of these currents of history, a national government dedicated to decentralization should decide to federalize that most grass roots of institutions, the private law of injuries.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF MARSHALL S. SHAPO, REPORTER, SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee: I am Marshall S. Shapo, of Evanston, Illinois. I am the Frederic P. Vose Professor of Law at Northwestern University School of Law in Chicago. I appear before you today at the request of American Bar Association President John C. Shephard to transmit to you the results, pertinent to broad federal product liability legislation, of a comprehensive five year study by the ABA on the tort liability system. Appended to my statement are the policy positions of the Association on this issue, which were adopted by our House of Delegates in 1981 and 1983. Since these policies have been discussed in detail by other ABA witnesses at prior hearings, the ABA has not sent a witness to address them today.

For the years from 1980 to 1984 I had the honor to be Reporter for the Special Committee on the Tort Liability System of the American Bar Association. That Committee was created by the ABA's Board of Governors in 1979, following a recommendation to the House of Delegates by a task force chaired by Mr. Shephard. The then president, Leonard Janofsky, appointed the Committee in 1979 with a charge to present a "review of the tort liability system" that would focus on: (1) "the present-day validity of the tort liability system in dealing with claims for phys-

ical injury," defined to include property damage; (2) "the strengths and weaknesses of the system in today's legal and social environment"; and, (3) "the consideration of appropriate modifications or alternatives to the current system aimed at curing identifiable defects while preserving the recognized strengths."

The Committee sought to fulfill that mission with a work that would explore the tort system in detail. Nothing less seemed appropriate, given the fact that, as the introduction to the Committee's Report says, "tort law has become a mirror of American society, held up to some of its most difficult moments of private conflict." To that end, the Committee and the Reporter took for themselves a broad mandate for independent inquiry.

The fruits of that inquiry appear in the 1000-page Report titled "Toward a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law." The views represented are not ABA policy but represent only the views of the Special Committee on the Tort Liability System.

One of the focal points of substantive law with which the Report deals, in several subchapters, is the law of products liability. With respect to a broad federal products liability statute, the Report "emphatically commend[s] the process for resolving legal disputes about products injuries . . . through state-oriented liability law." It says that "the heralded benefits of a general federal codification are likely to prove illusory," that such a law may well generate increased litigation, and that surely it will politicize a branch of law which the courts over a period of twenty years have developed in a nationwide judicial dialogue. I am attaching [1] to my statement pages 11-39 through 11-52 of the Report as the section most relevant to the Subcommittee's present inquiry. I offer this subchapter not as particular commentary on the immediately pending legislation but as general observations on the question of whether there should be federal products liability legislation. Because I believe the Senators on your Subcommittee will be interested in many parts of the Report, I am also attaching a summary of the Report. If any Senator on the Subcommittee would like a copy of the entire report, I will be happy to obtain one for you.

I thank the chairman and the subcommittee for permitting me to appear before you today.

Senator KASTEN. Thank you very much.

Mr. Teitz, you said that the negligence standard is contrary to law in 46 States. I simply want to state for the record that Professors Henderson, Birnbaum, Hopper, others, in testimony before this committee, have testified to the contrary. In a 1983 law review article which Professor William Powers wrote, he analyzed the law in 51 different jurisdictions, and stressed that a key fault element is present in the design and duty to warn tests of almost every State.

There is evidently a difference of opinion here, but it is clear that we have had significant testimony to the contrary.

I would like to ask you as well as Mr. Reynoldson and Mr. Shapo, if there was no such thing as the Uniform Commercial Code today, would you all—and the question here before us was should we adopt a Uniform Commercial Code or should we just let contract law go as it would, State by State by State, would you all be standing here testifying and talking about States' rights and opposed to a Uniform Commercial Code?

Mr. TEITZ. Well, I believe that the Uniform Commercial Code was adopted on a State by State basis based on a recommendation made by the Uniform commissioners. That issue was heard in State after State, and by and large it was adopted in substantially the same manner as it was proposed in the States because the substantive provisions were able to withstand the argument and the debate that went on in the Nation's 50 State legislatures, and therefore they accepted it.

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[1] The attachments were not reproducible and are in the Committee files.

Senator KASTEN. So you are saying you would be here testifying in favor of the Uniform Commercial Code or against it?

Mr. TEITZ. I am saying I would be opposed to it being enacted by Congress as opposed to by the States. I think that if there is in fact a need for uniform product liability legislation, that is a decision to be made in the Nation's 50 State legislatures, and I submit to you, Mr. Chairman, that if uniform proposals in the past have not fared well, it may be because their substantive provisions have not been able to withstand the test of debate and discussion in those 50 State legislatures.

Senator KASTEN. I want to get the responses from the other two people, but I think it is important to point out what Mr. Banks particularly pointed out, that State by State by State it happens that there are a large number of trial lawyers who have become very active in State legislatures and very active in lobbying State legislatures, and as a result of their influence on State legislators and State legislatures, State by State by State the uniform product liability law was either changed or amended or simply outlobbied, and what happened was we were unable, we have been unable to adopt a uniform standard State by State by State because of the inordinate political pressures.

But Mr. Shapo, would you be here testifying against the Uniform Commercial Code?

Mr. SHAPO. Well, Senator, I think that the question itself captures the objection to this bill. The Uniform Commercial Code is not Federal legislation. It is a uniform act, and it required passage by each of the States. And if I could have a minute just to review the history as I recall it of these events, we did start after the report of the interagency task force with a model act which was, I take it, analogous to the UCC. Then we had S. 2631, then we had S. 44, now we have S. 100, and latterly, we have the Gorton proposal.

The implication is that each time we have got it right. I suggest that the proper inference is that we are still thinking through the problem. While I have not had time to flyspeck S. 100, it seems to me that section 17, I think it is, although it is superficially attractive in requiring ongoing study, indicates that before Congress should take such a step, still more study is needed.

I guess what I am saying is that the uniform law route will tend more strongly to make sure that we get it right.

Senator KASTEN. Mr. Reynoldson, do you want to make a brief comment?

Mr. REYNOLDSON. Yes. We have no objection to the Uniform Commercial Code inasmuch as it was State law and enacted by the States. But beyond that, an examination of the annotated code in any one of those States would prove conclusively that the statement was wrong that was made here today with respect to S. 100, that we could have one document to determine the law, because the States as they have interpreted the commercial code have come to various conclusions. We are still struggling with it in Iowa after 20 years, trying to construe the different provisions.

When we go to look, we find that other States have construed those commercial code provisions differently, and we have a choice whether to go with this group of States or that group of States.

So "uniform legislation" does not necessarily ensure uniformity. It is the same thing that will happen with S. 100.

Senator KASTEN. Lieutenant Governor, I just would like to ask you to comment on the ABA position expressed by Professor Shapo, particularly on the basis of your practical experience as lieutenant governor, and also in the legislature.

Mr. RYAN. Well, I first of all would point out that I am not an attorney either, and I am not sure that I want to get into a debate with Professor Shapo about any details on law.

I think that this is really a pretty simple problem and that all it needs is a little common sense injected into it. Basically, when you look at some of the awards that have been made and the products that have been involved, we have decent laws in Illinois, but they do not do us any good because 70 percent of our products are shipped in interstate commerce, and as a result, we do not have the opportunity to take advantage of our laws.

I pointed that out, I think, in my testimony.

And the red light is on, and I do not know what that means. That means shut up, I guess.

Senator KASTEN. That means that my 5 minutes is up.

Mr. RYAN. I see. All right.

Senator KASTEN. I just want to say, talking about the laws in Illinois, I would quarrel with you a little bit about the cranes that are back-uppable into a power line. I like the way Minnesota does it or the way New Mexico does it better than the way Illinois does it, but if I were in the business of insuring cranes made in Milwaukee, WI, Harnseshvager or whatever, I think that in order for a crane to work, it has got to be, if you will, back-uppable into a power line, and as you know, in your State, you right now have a system in which the crane manufacturer is liable for that accident rather than the person that trained the employee or the operator himself.

But I am not going to quarrel with you. I think that overall what you are saying is exactly right. The problem is that not everything that is made in Illinois is sold in Illinois, and we are involved here in a morass of state by state by state in a patchwork of laws that simply are contradictory, and that is why we have the costly system we have.

Senator Hollings?

Senator HOLLINGS. Thank you, Mr. Chairman.

Just to cut it so we can have time for the other panel, let me ask that I include this letter from the American Bar Association dated March 20, 1985, in the record after Mr. Banks' prepared statement.

Senator KASTEN. Without objection, so ordered.

Senator HOLLINGS. And I would like to thank each of the witnesses for their appearance. They have come here at some sacrifice, particlarly Justice Reynoldson, all the way from Iowa in his own personal circumstances. So we appreciate their appearance.

I just want to say that I can see in these hearings just a suggestion that we are going to try the trial lawyers. Let me state that I served in that legislature for 10 years, and I served as a lieutenant governor. We never have seen an industry move from South Carolina to Wisconsin. I could give you a list of those that came from Wisconsin to South Carolina, and I never did see a trial lawyer up there in the legislature. It is the banks that are appearing there,

the power companies, the insurance companies. I can name them. They were my best friends. And I never did see any trial lawyers for 10 years running around the legislature. They were home making money.

Mr. BANKS. Today you have got a Banks who is a trial lawyer.

Senator KASTEN. We would like to thank all of you, and let me just say at this time, there are a number of questions which other members of the committee may have which we will submit to you for the record. Hopefully you can get back to us. The needs of time prevent us from asking some of the questions that we would like.

Thank you all very much.

Next we have Mr. Laurence Gold, who is the general counsel, American Federation of Labor and Congress of Industrial Organizations. Mr. Gold.

STATEMENT OF LAURENCE GOLD, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. GOLD. Thank you, Mr. Chairman. We have submitted a statement and I wish at this point to outline the main subjects that we touch on and then to try to answer any questions you may have.

In our view, the product liability system should serve two principal functions: First, it should provide fair and timely recompense to individuals who are harmed by unsafe products; and second, at least in the absence of effective direct regulation of product manufacturers to assure that they cannot and do not introduce unsafe products into commerce, product liability law is a means of inducing manufacturers to act responsibly.

While reasonable people may disagree as to how well the product liability system is performing the second of these functions, there is no doubt that it is failing in its first and principal mission, victim compensation. In the main, the existing product liability system depends on tort litigation to assure that victims of unsafe products are compensated for the harm they suffer. Yet litigation is a notoriously slow, costly, and uncertain means of redistributing losses, one that siphons off too many dollars to pay lawyers and that leaves too many victims without an adequate remedy.

The established alternative to litigation is workers compensation, which was developed at the beginning of this century to address these failings where workers suffer occupational injuries. Unfortunately, the workers compensation system suffers from failings of its own: Unduly restrictive coverage, woefully inadequate benefit levels, and an incapacity to cope with losses occasioned by occupational diseases. Each of these have tended to render the compensation system incapable of achieving its worthwhile goals.

Because in our view the tort law system and the workers compensation system are failing in what should be their primary tasks, the AFL-CIO believes that it would be entirely appropriate and desirable for Congress to develop national legislation that improves the present situation. The AFL-CIO has long favored, for example, a Federal workers compensation law and a Federal occupational disease law.

We do not doubt either Congress' constitutional authority to enact such legislation or the propriety of Federal legislation in this area, and we are aware of at least two ongoing efforts to draft product liability bills that would create a no-fault compensation system as an alternative to a fault-based tort law system. It is our belief that such an alternative might well meet the major shortcomings of the laws on the books. The AFL–CIO therefore looks forward, as the debate on product liability continues, to working with those who are willing to take steps at the Federal level toward providing full, fair, and certain compensation to those harmed by unsafe products.

In this regard, we are particularly heartened by Senator Dodd's statement of March 19, which is in the record, and by the bill that he has introduced. While we do not either endorse or necessarily agree with each and every point that Senator Dodd has made, it seems to us that the approach he takes is on an eminently sound tack.

But, with all respect, Mr. Chairman, we feel compelled to state this year, as we have stated in the past, that the bill that is presently pending before the committee, in this instance S. 100, represents a large step in precisely the wrong direction. This is true in our view for two reasons.

First, S. 100 accepts as a given the underlying premise of the tort law system, namely that litigation is the appropriate vehicle for providing compensation to victims of unsafe products. The bill does nothing to address the problems of the large transaction costs of litigation, the delay entailed, or the uncertain and often inequitable results produced.

Second, having accepted the fundamental premises of the tort system, S. 100 proceeds to alter the substantive rules of liability in that system in a fashion that disserves the tort law's aims. S. 100 does this by erecting new barriers to compensating the victims of unsafe products and thereby correspondingly diminishing the incentive of manufacturers to produce safer products.

Our review leads us to conclude that what we said in last year's Congress about S. 44 remains largely true about S. 100 as well. Its organizing principle in most instances is to select a legal rule that is more protective of the defendant than the rule in force in the States that have taken the obligation to protect consumers and workers most seriously.

Since the committee has before it from last year detailed criticisms of the provisions now incorporated in S. 100, in particular Senator Hollings' statement in the committee report on S. 44 that carefully exposes the multiple flaws in the bill, and since the time is limited, I will rest on Senator Hollings' exposition and on the remainder of our statement, which details in particular our difficulties with the portion of S. 100 delineating the duty to warn. And with that said, I will attempt to answer any questions that you have.

Senator KASTEN. Mr. Gold, what would you like to see? You mentioned an alternative—what would the AFL-CIO like to see as an alternative no-fault compensation system?

Mr. GOLD. Just so what I think is a slip of the tongue is not perpetuated in the record, we would like to see an alternative to the

fault-based tort system. And as I have indicated, we think that approaches which could well supplement that system, and not replace it—such as that Senator Dodd has proposed, that Senator Gorton has spoken in favor of, that is already incorporated in the workers compensation system and that was forwarded in the proposal that Representative Miller made last year to deal with the toxic substance area—is what is needed. In other words, we believe that there ought to be at least a bedrock system that provides compensation for actual economic loss, and that does not get into all the complexities raised in fault-based systems.

Senator KASTEN. Are you saying that you are opposed to the basic idea in tort law of finding, pinpointing responsibility, that you just simply do not want to worry at all about fault or responsibility?

Mr. GOLD. We are saying that if somebody for profit makes a product that is improperly manufactured or that——

Senator KASTEN. Then they are at fault, if they have made a product?

Mr. GOLD. That is not the rule, at least as I understand it, either in S. 100 or in the product liability law in the majority of States. The plaintiff does not have to demonstrate fault in any traditional sense of that term if there is a manufacturing defect. You compare the product against the ideal product the manufacturer was attempting to make, and you do not ask whether, either under the state of the art or on any other basis, it is humanly possible to design a manufacturing line which will not every 100,000 products, every 10 products or whatever, make an imperfect product.

So I cannot agree with what you said.

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. Thank you very much.

Mr. Gold, I take it under the Dodd bill—I have not had an opportunity to study it in depth, but it has the dual approach, either the one compensation approach or the other of product liability action, a sort of a limited version of S. 100.

Now, the objections that you filed today in your statement to S. 100, I guess they would similarly apply to that portion of the Dodd bill?

Mr. GOLD. To begin the Dodd bill takes only a narrow piece of the tort system and federalizes only that piece, and leaves the State law otherwise pretty well intact. Moreover, we have not reached a judgment one way or the other.

Senator HOLLINGS. You have not reached that judgment?

Mr. GOLD. Not on Senator Dodd's exact proposal. But in terms of many of the points that you have made in the past on what the proper balance between Federal law and State law ought to be, I would suggest that the Dodd approach is closer to what you have said than S. 100.

Senator HOLLINGS. Thank you. Very good.

Thank you, Mr. Chairman.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I have a question to regarding subsequent remedial measures, section 13 of this bill.

It would seem to me that this would actually, S. 100 would actually encourage a higher safety standard as I read it, because as re-

gards safety S. 100 actually provides incentives for manufacturers to make innovative improvements in products by not holding those innovations against them in trying product liability cases.

For example, presently a manufacturer can be penalized, actually, for making safety innovations, it would seem to me, where, as I read, section 13, S. 100 would actually give him more incentive to make the safety innovations in terms of design defects. Do you read section 13 the same way?

Mr. GOLD. No, Senator, I do not. It does not seem to me that insulating someone from his past fault, if fault was really there, is a way of improving safety. The pressure the tort system or compensation system imposes by requiring a manufacturer to pay for the harm he causes will likely overbear any fear he has that his improvements, which henceforth will reduce the number of injuries, will be held against him.

In other words, if you put out a product which is injuring people and those people are assured of getting compensation and you thereafter improve the product or know how to improve the product in a way which will diminish the number of claims in the future, one hopes that you—I do not mean to personalize it—the manufacturer would be induced by his savings in the future to make the change.

Now, what the social optimum answer ought to be to the question whether that change ought to be held against him to show that he could have done better in the past, I do not know. But I do not see any reason for depriving the jury or the judge of the knowledge that there is a subsequent change, any more than I would deny the judge or jury the knowledge that another manufacturer has designed a safer product. It just does not seem to me to——

Senator PRESSLER. But that is exactly what would happen under S. 100, what you find.

But do you feel that it is fair to use the 1985 design standard against something that would be built in 1950?

Mr. GOLD. That depends on the extent to which the idea was in the wind and what type of compensation you are providing. Let me put it the other way. Is it fair to say to somebody who has lost his capacity to lead a decent life by reason of that product produced in 1950, you are a victim of the manufacturer's ignorance?

Senator PRESSLER. Well, our inability to foresee or look into a crystal ball—if it was not in the wind at all, the innovation was not in the wind at all—seems a very unfair standard to me.

Mr. GOLD. There are two different parties to these kinds of actions: The person who is harmed and the person who produced the product, and sold it for an amount of money, that caused the harm. I must say that if you put yourself in the position of the person who is harmed, I do not know where the unfairness is.

Senator PRESSLER. Yes, but basically, without the qualifications, without whether something was in the wind—let us say it was not. Do you think it is fair, just a yes or a no sort of a thing without all of the qualifications, to hold someone to a 1985 standard of what is known in 1985 on something that was built in 1950, when there was nothing in the wind?

Mr. GOLD. All right. Without any qualifications, my point of view is that it is fairer to do so than to leave the harmed person without compensation.

Senator PRESSLER. I would disagree with you. They would have compensation under S. 100.

Senator KASTEN. Mr. Gold, I want to summarize because we have one further panel. This is turning into a marathon today.

But my understanding is that the AFL-CIO, with respect to section 10, which is the relationship of product liability and workers compensation, is now supportive of that section. Is that your understanding as well?

Mr. GOLD. No, that is not entirely accurate.

Senator KASTEN. That is not your understanding. In testimony that either you or some representative of the AFL-CIO in testimony last year, evidently you did testify in favor. Is your position changing?

Mr. GOLD. No. My memory of the position we stated was that the new version of section 10 cured many of the difficulties we had pointed out before—but it is my memory—but we still stated some reservations on the provision. I think it might be best, so that you know precisely where we stand—and so that I am not reduced to trying to remember what either I or somebody else said last year—to answer that question in writing.

Senator KASTEN. It was you or someone representing your group whose last word was, it deserves favorable consideration, but we are anxious to work with you. We are also anxious to work with you. As you know, we redrafted the warning section of this bill last year, also in an attempt to work with you and address your concerns. A manufacturer must always warn the product user unless it is absolutely impossible or economically infeasible and a reasonable and prudent person would not have done so.

And we look forward to working with you. We are not necessarily going to agree step by step by step, but I just want to thank you for your help, your input, and we are anxious to continue this ongoing dialog.

Mr. GOLD. I do not want to hold the hearings up, but let me make two points. One, I do want to emphasize that we continue to believe that in principle this is a problem that deserves congressional attention, and in those terms we do not disagree with what you are doing. The question is what should Congress seek to accomplish.

Second, on both the interplay with the workers compensation law and on the warning provision, we do think that you have made important changes. As I say—and I will put our position in writing—we do not think that we are in perfect agreement yet. But we appreciate the fact that—even though there are many differences between us—you are willing to take account of our suggestions in these regards.

Senator KASTEN. Thank you. We look forward to working with you. We thank you very much for your testimony today.

[The statement follows:]

STATEMENT OF LAURENCE GOLD, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. Chairman, the American Federation of Labor and Congress of Industrial Organizations [AFL-CIO] appreciates this opportunity to state its views on S. 100, the Product Liability Act bill that you have introduced.

Product safety is of the utmost importance to the AFL-CIO. Each year, unsafe products injure or cause the illness of thousands of individuals. Included among this group are a large number of workers who suffer occupational injuries or diseases as a result of working on unsafe machinery or with toxic substances; the Insurance Services Offices closed claim survey found that 50 percent of the payments made in product liability cases go to injured workers.

In our view, the product liability system should serve two principal functions. First, it should provide fair and timely recompense to individuals who are harmed by unsafe products. There is no justification for leaving these innocent victims uncompensated for the losses they incur that are caused by an unsafe product.

Second, at least in the absence of effective direct regulation of product manufacturers to assure that they cannot and do not introduce unsafe products into commerce, product liability law is the means of inducing manufacturers to act responsibly. There is no justification for providing an economic incentive to make unsafe products; to the contrary, product liability law should impose disincentives by assuring that any potential for monetary gain in producing an unsafe product is outweighed by the potential liability costs.

While reasonable people may disagree as to how well the product liability system is performing the second of these functions, there is no doubt that it is failing in its first and principal mission: victim compensation. In the main, the existing product liability system depends upon tort litigation to assure that victims of unsafe products are compensated for the harm they suffer. Yet, litigation is a notoriously slow, costly and uncertain means of redistributing losses—one that siphons off too many dollars to pay lawyers and that leaves too many victims without an adequate remedy.

The established alternative to litigation is workers compensation which was developed at the beginning of this century to address these failings of the tort law where workers suffer occupational injuries. Unfortunately, as the Report of the National Commission of State Workmens' Compensation Law has documented, the workers compensation system suffers from failings of its own which have rendered the compensation system incapable of achieving its worthwhile goals. These problems include unduly restrictive coverage, woefully inadequate benefit levels, and an incapacity to cope with the losses occasioned by occupational disease.

Because, in our view, the tort law system and the workers compensation system are failing in what should be their primary task—providing adequate compensation to the victims of unsafe products—the AFL-CIO believes that it would be entirely appropriate and desirable for Congress to develop national legislation that improves the present situation. The AFL-CIO has long favored, for example, a federal workers compensation law and a federal occupational disease law to assure that workers who suffer occcupational injury or disease receive adequate compensation without regard to the state in which they happen to reside. We do not doubt either Congress' consitutional authority to enact such legislation or the propriety of federal legislation in this area. And we are aware of at least two ongoing efforts to draft product liability bills that would create a no-fault compensation system as an alternative to a fault-based tort law system. It is our belief that such an alternative might well meet the major shortcomings of the laws on the books.

The AFL-CIO looks forward as the debate on product liability continues, to working with those who are willing to take steps at the federal level toward providing full, fair and certain compensation to those harmed by unsafe products. But with all respect, Mr. Chairman, we feel compelled to state that the bill that is presently pending before the Committee, S. 100, represents a large step in precisely the wrong direction. This is true, in our view, for two reasons.

First, S. 100 accepts as a given the underlying premise of the tort law system—namely, that litigation is the appropriate vehicle for providing compensation to victims of unsafe products. The bill thus does nothing to address the problems of the large transaction costs of litigation, the delay entailed, or the uncertain and often inequitable results produced. Indeed, if anything, S. 100 will exacerbate the cost, delay, and uncertainty of product liability litigation by displacing rules that within each State are by now well-understood with a new body of law that will have to be interpreted and clarified through the process of case-by-case adjudication.

Second, having accepted the fundamental premises of a tort system, S. 100 proceeds to alter the substantive rules of liability in that system in a fashion that disserves the tort law's aims. S. 100 does this by erecting new barriers to compensating the victims of unsafe products and thereby correspondingly diminishing the incentives on manufacturers to produce safer products. Our review leads us to conclude that what we said in the last Congress about S. 44 remains largely true about S. 100 as well: its organizing principle in most instances is to select a legal rule that is more protective of the defendant than the rule in force in the states that have taken the obligation to protect consumers and workers most seriously.

The Committee has before it from last year detailed criticisms of the provisions now incorporationed in S. 100; in particular, Senator Hollings' statement in the Committee report carefully exposes the multiple flaws in the bill. Accordingly, we will not burden the Committee by replowing that ground. But to illustrate what we see as the recurring failings of the bill—and to highlight a subject of especial concern to the AFL-CIO—we think it would be useful to evaluate the provisions of S. 100 pertaining to the duty of a product manufacturer to warn users of dangers posed by use of the product.

In our view, the rule that should prevail in the duty-to-warn area can be simply stated: the product manufacturer should be required to warn users of any danger posed by a forseeable use of the product at least if the manufacturer is, or should in the exercise of reasonable diligence be, aware of the danger. Wherever practicable, the warning should be made in such a way as to come to the attention of the ultimate user. A breach of this duty should result in liability being placed upon the manufacturer.

The provisions of S. 100 concerning the duty to warn bear little resemblance to these common-sense principles. Those provisions are complex and confusing and, in our judgment, can only be characterized as a concerted effort to protect manufacturers from liability for failing to warn of even known dangers.

To begin with, S. 100 does not require manufacturers to warn of all dangers of which the manufacturer is, or should be, aware; the only duty imposed on manufacturers is a duty to act with reasonable prudence in deciding whether to warn of such dangers. We cannot begin to fathom why, once it is determined that a manfacturer knew or should have known of a danger posed by a product, a jury should be left to decide whether the manufacturer acted negligently in failing to warn of the danger.

Second, S. 100 hedges on the issue of whether warnings must be given to the ultimate user of the product; under § 6(d) the resolution of that issue is to be made by a jury on a case-by-case basis in light of several broadly stated considerations. This section thus provides an opening to provide a warning that reaches only the employer who purchases the product and not the workers who are actually exposed to the dangers created by the product.

Third, S. 100 does not require that warnings be given of the dangers entailed by a particular use or a particular alteration of a product unless the use or alteration is "expected, ordinary and familiar." This means that warnings are not required as to even known dangers posed by uses or alterations that are reasonably foreseeable or actually foreseen, even though such warnings could prevent the dangerous use or alteration from occurring.

Fourth, the ancillary rules in S. 100 governing liability for a failure to warn are designed to provide manufacturers broad insulation from liability. For example, under § 6(b)(1), liability attaches only if the manufacturer knew or should have known about the particular risk that caused the claimant's harm; this means that a manufacturer's failure to warn users that a product causes lung cancer would not be a basis for compensating a user who contracted some other disease as a result of using the product, even if a cancer warning would have dissuaded the individual from using the product. Similarly, under § 6(b)(3), a manufacturer who fails to warn is not liable unless the claimant proves that had warnings been given, the warnings would have been heeded; this is contrary to the rule in many states that the manufacturer who fails to warn has the burden of proving that its failure was not a cause of the injury that occurred.

The short of the matter is that in its treatment of the duty to warn—as in its treatment of many other subjects encompassed in the bill—S. 100 disserves the goal of providing fair and timely compensation to those who are victimized by unsafe products, and in that way the goal of assuring that manufacturers make safer products. Accordingly, the AFL-CIO vigorously opposes the enactment of this bill.

[The following information was subsequently received for the record:]

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, DC, April 10, 1985.

Hon. ROBERT KASTEN,
Chairman Consumer Subcommittee of the Senate Commerce Committee, U.S. Senate, Washington, DC.

DEAR SENATOR KASTEN: The purpose of this letter is to supplement, in one particular, the testimony I presented on behalf of the AFL-CIO before the Consumer Subcommittee concerning S. 100.

During the course of my testimony, you asked me for the AFL-CIO's position on § 10 of S. 100, the section of the bill which addresses the relationship between worker's compensation and third party tort litigation. In responding I requested the opportunity to consider the question more fully and to supplement my oral reply with a written one.

As you noted, in a statement the AFL-CIO submitted to the Subcommittee last year, we said that § 10 had "been redrafted to answer prior criticisms and is now worhty of favorable consideration." We remain convinced that the section as presently framed is a substantial improvement over prior versions. However, as the result of subsequent analysis of last year's product liability bill by Senators Kennedy, Eagleton and Metzenbaum, which appears at 130 Cong. Rec. S 13267-S 13273 (Daily Ed., October 3, 1984), we now see that § 10 still suffers from one serious flaw: that section provides for a reduction of a claimant's damages, in a tort suit, by the "present value of all workers' compensation benefits to which the employee is or would be entitled for the harm" (emphasis added). This means that where a worker has not yet received a workers compensation award at the time his/her tort claim is tried, the jury will have to make a prediction as to the amount of workers compensation the individual will receive in the future. Unless the jury proves to be clairvoyant—which seems unlikely—the damages awarded by the jury will be either less than or more than the workers compensation award. That we submit, does not make good sense. See 130 Cong. Rec. at S 13270.

In our view, a better means of meeting the problem presented when a jury must pass on a damages claim before the companion workers compensation claim is determined is to permit the jury to make its full award of damages to the claimant and then, by operation of law, to assign to the defendant(s) in the tort suit the claimant's rights under workers compensation, up to the amount of the damages award that represents compensation for actual economic losses. Such a system would assure that the claimant is neither under compensated nor compensated twice for his/her loss.

Very truly yours,

LAURENCE GOLD,
General Counsel.

Senator KASTEN. Our final panel will include Mr. Wagner, Mr. Larsen, Mr. Page, and Mr. Stayin.

First of all, the committee will come to order. Let me say to all of you, I appreciate your endurance and your stamina. The first witness will be Mr. Harold Wagner, representing the National Machine Tool Builders, accompanied by Mr. James Mack, Mr. Wagner.

STATEMENTS OF HAROLD J. WAGNER, PRESIDENT, SETCO INDUSTRIES, INC., CINCINNATI, OH, REPRESENTING THE NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION, ACCOMPANIED BY JAMES MACK, LEGISLATIVE DIRECTOR; ROBERT L. LARSEN, PRESIDENT, INSURANCE ADMINISTRATION CENTER, PARK RIDGE, IL; JOSEPH PAGE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC; AND RANDOLPH J. STAYIN, COUNSEL, REPRESENTING THE AMERICAN TEXTILE MACHINERY ASSOCIATION, ACCOMPANIED BY DURANT A. HUNTER, SENIOR VICE PRESIDENT, HOGLAND, MacLACHLAN & CO., INC., WELLESLEY, MA

Mr. WAGNER. Mr. Chairman, thank you. We have previously submitted our written statements.

My name is Harold Wagner. I am president of Setco Industries, Inc., of Cincinnati, OH. We manufacture grinding machines and a lot of other items for the machine tool industry. We presently employ 115 persons. With me today here is Mr. James Mack, public affairs director of the National Machine Tool Builders' Association, of which we are a member, and whose product liability committee I have had the privilege of chairing the last few years.

As I sit here before you today, my own company is again facing the frightening prospect of operating on an entirely uninsured basis. We return to the precarious days of the late seventies when we, along with about one-fourth of NMTBA's members, were completely without coverage.

We are of course making every human effort to find affordable insurance. I honestly do not know if we will be successful again this year. On the average, industry premiums rose more than 30 percent in 1985 and we feel this is just the beginning.

Nobody wins in circumstances like these, not the manufacturer, not the injured claimants who may be left uncompensated if all the manufacturers' resources are depleted, and not the public who may be denied access to these products. The only winners under the current situation are the lawyers.

The details of the lawsuit in which my company was recently involved will I think provide a good illustration of both why insurance rates are what they are and how enactment of S. 100 in our opinion would address the product liability problem.

In 1948, we sold a small motor unit, not a complete machine, to a dealer who subsequently resold it to an employer. The employer built the finished machine, the complete product, using our component along with a large portion of components manufactured by the employer himself. Although the employer recognized that the machine he had completed was unsafe because it lacked a guard, it permitted its employees to use the machine for approximately 29 years prior to the injury, which occurred in 1979.

The claimant sought damages against Setco for $400,000. The employer who built the machine instituted a subrogation claim for more than $35,000. Although we ultimately were able to negotiate a settlement with the claimant last year, the employer's insistence on subrogation considerably prolonged this process.

So the end result is an expense to us exceeding $140,000 and many years of aggravation, all this in relation to a machine we did not build and really an injury for which we were in no way responsible. Clearly the system is not working when results such as this are permitted to occur. My company's experience is typical of what many manufacturers of capital goods encounter with regularity.

Under S. 100 this suit would never have been brought under the 25-year statute of repose which applies to capital goods. This provision recognizes that it is unfair to continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age.

S. 100, however, does exempt from the statute of repose latent harms, harms caused by prolonged exposure, and situations involving fraud.

Second, S. 100, by eliminating the subrogation lien, would have simplified the settlement process and, more importantly, would

have prevented the employer from passing his worker compensation costs along to us, the original manufacturer, thus resulting in a safer working environment. The accident in question might never have happened.

Finally, if there had been a clearer standard in the law we believe the case, which spanned over 5 years, would never have been brought or that it would have been settled more quickly.

Product liability is a problem which simply will not go away. The prompt approval of S. 100 will permit this Congress to deal with a serious impediment to interstate commerce in a manner which is both fair and effective and which will result in lower costs, safer products, and safer workplaces. Thank you.

[The statement follows:]

STATEMENT OF HAROLD J. WAGNER, PRESIDENT, SETCO INDUSTRIES, INC., REPRESENTING THE NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

INTRODUCTION

Good morning, my name is Harold J. Wagner. I am President and Chief Operating Officer of Setco Industries, Inc., located in Cincinnati, Ohio. The company manufactures grinding machines, including accessories, attachments and auxiliary equipment. We currently employ approximately 115 persons. I am appearing this morning on behalf of the National Machine Tool Builders' Association [NMTBA], a national trade association whose member companies account for more than 85% of domestic machine tool production. With me today is James H. Mack, NMTBA Public Affairs Director.

NMTBA appreciates the opportunity to appear before this Subcommittee and discuss the product liability crisis which continues to confront our nation's economy. As you know, Mr. Chairman, product liability is of critical and overriding concern to the nation's machine tool builders. Therefore, we are encouraged by the substantial progress which was achieved last year toward Senate passage of a uniform product liability law—progress which culminated in this Committee's overwhelming approval of the Product Liability Act (S. 44), favorably reported in March, 1984. Mr. Chairman, we commend your patience and perseverance with regard to this important issue, evidenced by your prompt re-introduction of the Product Liability Act (S. 100) in January of this year. We are hopeful that S. 100 and these hearings will lead Congress to a speedy and successful resolution of the serious (and worsening) product liability problem currently faced by manufacturers and consumers alike.

Before proceeding with our comments on S. 100, I would like to offer a brief overview of the domestic machine tool industry and where it is today. NMTBA represents those in the business of manufacturing the tools of metalworking productivity, including cutting, grinding and forming machines, universal measuring machines, and automated production systems. Although the industry is relatively small by some corporate standards, America's machine tool builders account for a very basic and strategic segment of the nation's industrial capacity—this is the industry that builds the machines essential to our military readiness and our ability to respond in the event of a national emergency.

Following a disastrous year in 1983, the machine tool market appeared to be gaining momentum during 1984. New orders for 1984 were 72 percent ahead of comparable 1983 figures; although one must keep in mind that 1983 orders were at one of the lowest points in the industry's history. Shipments, reflecting the relatively slow pace of 1983 orders, were up 23 percent over 1983 levels. Certainly the fact that the industry has begun to turn around is a hopeful sign, as are recent surveys indicating that manufacturers plan to continue the boost in their capital spending during 1985.

But while the above-mentioned signs are positive, they by no means signal a full-fledged return to prosperity for the entire industry. Most machine tool builders continue to remain in a state of severe financial strain due to the modest recovery in shipments.

A major factor complicating the prospects for recovery is the spectre of further import inroads into the American machine tool market. Based on current trends, we estimate that imports, measured by value, will account for a staggering 38 percent of 1984 domestic machine tool consumption. Unfortunately, imports have shown

every sign of maintaining or increasing this market share as the recovery unfolds in 1985.

These developments have, understandably, taken a toll in terms of the industry's export outlook. Steady import penetration, the recent worldwide recession, unrealistic export control policies and, perhaps more importantly, the over-valued dollar have severely hampered the industry's ability to export on a competitive basis. The result is a shocking deterioration in export performance—a decline of 60 percent in just three years. Clearly, the U.S. machine tool industry is confronting unprecedented competitive pressures.

Unfortunately, at a time when this country faces an unprecedented trade deficit and when the U.S. machine tool industry is struggling to retain its competitive edge, product liability is working against our ability to compete fairly and effectively in the international market place. Let me explain briefly why this is so.

The cost of product liability insurance is an expense taken into account by manufacturers when setting the price of their products. Because many foreign machine tool manufacturers sell the bulk of their goods in countries other than the United States and because foreign product liability rules are much less cumbersome and substantially more defense-oriented than in the U.S., the product liability costs borne by our foreign competitors are significantly lower than ours.

The U.S. machine tool industry's exposure to liability for injuries associated with the use of older products is a factor which contributes prominently to this result. Foreign machine tool builders—unlike their American counterparts—do not face product liability exposure on their older products because their penetration into the U.S. market has been relatively recent.

The fact is that, generally speaking, American manufacturers and product sellers routinely pay premiums which are 20 times higher than those paid by their European competition.[1] The competitive disadvantage is obvious. American products destined for overseas markets are necessarily priced to reflect insurance costs which vastly exceed those incurred by foreign competition; here at home, the price of imported products can be lower because the product liability insurance rates for the foreign builder of those products are lower.

A uniform product liability law such as S. 100, providing clear and balanced legal guidelines and thus reducing the extraordinarily high transaction costs currently associated with product liability claims, would help stabilize this insurance market. Consequently such a law would enhance our ability to compete more effectively in this country and abroad.

THE NEED FOR A FEDERAL UNIFORM PRODUCT LIABILITY LAW HAS BEEN CLEARLY ESTABLISHED

S. 100 is the product of prolonged analysis and carefully crafted compromise. During the Ford and Carter administrations, the Federal Interagency Task Force, headed by the Department of Commerce, identified and examined virtually every aspect of the complex problems affecting interstate commerce which have resulted from the current state-by-state approach to product liability law.[2] And, the need for and composition of fair and balanced product liability reform was extensively reviewed in the House of Representatives during the 96th Congress.

Hearings before this panel in March, 1982 established the interstate nature of the product liability problem and the need for a federal solution. Additional hearings in July, 1982, April, 1983 and March, 1984 provided an opportunity for further legislative refinement. Throughout this process, the Committee heard from a variety of parties, including consumer representatives, the organized bar, manufacturers and other product sellers, the Administration, and several noted tort law experts representing the academic community.

Several pertinent conclusions emerged from these hearings. First, the chaotic, helter-skelter nature of product liability tort law has produced a litigation system plagued by uncertainty, imbalance, and unpredictability. Because the rules determining the liability of product sellers for product-related injuries have been developed almost exclusively by judges on a case by case basis, they vary from state to state, sometimes resulting in direct conflict. Because products are distributed nationwide, instability in the law acts as a formidable impediment to interstate com-

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[1] *See*, T. Marriott, "Product Liability and Interntional Trade," *Product Liability & Tort Law Reform*, National Legal Center for the Public Interest, at A-128 (April, 1982).

[2] For a detailed account of these initiatives, *see, generally*, Interagency Task Force Final Report, U.S. Department of Commerce (1977). *See also*, S. Rep. No. 98-476, 98th Cong. 2nd Sess. (1984), at 10-11.

merce. Although a manufacturer may have facilities in only one state, his or her product may be sold throughout the country via numerous distribution networks. The law applicable in the manufacturer's home state only affects product liability claims arising there—it does not affect claims which may arise in the other 49 states. The following examples help illustrate the extent to which uncertainty currently characterizes much of U.S. product liability law.

Consider the plight of a manufacturer who attempts to provide an adequate warning concerning the safe use of a product which may be distributed for nationwide sale. The majority of states generally recognize that consumers have a responsibility to use products in a safe manner and that manufacturers should not be required to warn against obvious dangers which a reasonably prudent person should be able to discern and avoid. Nevertheless, product sellers are faced with an untenable situation in which they are liable in some states if they do not warn against obvious dangers, and are liable in other states if they do not warn against obvious dangers, and are liable in other states if they do (because these courts believe that warning about obvious dangers "waters down" the effectiveness of more necessary warnings).[3]

Manufacturers face similar uncertainty with regard to product design standards—a design determined to be "unreasonably dangerous" in one state may well pass muster in another. Some states, such as California, do not even require a showing that the product was unreasonably dangerous; but they do require that the defendant prove the absence of fault. All of this increases both legal and production costs. Consumers ultimately shoulder the costs in the form of higher product prices. And, in some instances, disparity in the law may limit the consuming public's access to innovation and product safety. Traditional tort law, for example, has prohibited the plaintiff from using evidence of the defendant's new safety improvements in his or her products to show that the design of older products was unsafe. This rule has recently fallen by the wayside in a few states. A rule which permits evidence of subsequent remedial measures to be introduced in a product liability claim involving an older product may deter manufacturers and product sellers from taking such measures, because they may, legitimately, fear that the introduction of such evidence will affect them adversely in court.[4] When asked to illustrate this by example, manufacturers are faced with a Hobson's choice—providing examples may subject them to further liability.

Manufacturers' liability for alleged design defects is further complicated by the inordinate confusion which surrounds the concept of strict liability—that is, liability without fault. While a growing number of state courts purport to apply a strict liability standard in design deffect cases, the fact is that most courts have developed methods of analysis which rely on negligence concepts to determine whether a product is defective—concepts such as "reasonableness" and "risk/utility," but often courts, in what amounts largely to a semantic rather than substantive exercise, attempt to combine the "apples" of negligence with the "oranges" of strict liability. The inevitable result is a muddled standard which contributes significantly to uncertainty in the law.[5]

In addition to its adverse effect on interstate commerce, uncertainty in the law of product liability has also resulted in transaction costs which are intolerably high. Unquestionably, the cost of resolving product-related claims has risen sharply in recent years—due largely to lengthy litigation over applicable rules of liability. Data developed by the Insurance Services Offices, for example, reveals that for every 66 cents an injured claimant receives, 77 cents goes toward legal expenses. Other studies have revealed an even more startling disparity. As noted below, this is a factor in rising insurance costs. It also explains why segments of the organized bar (but not all lawyers) are opposed to the enactment of S. 100. The bill would substantially reduce legal costs.

Finally, uncertainty in the tort litigation system is reflected in product liability insurance rates, which have been noticably erratic during the past decade. Insurers,

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[3] Section 6(e) of S. 100 codifies the majority view and does not require warnings against dangers that are obvious—a provision which increases the likelihood that warnings against hidden or less obvious dangers *will* be heeded.

[4] Section 13 of S. 100 reflects the view currently held by the overwhelming majority of states—evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible. This provision comports with rules 403 and 407 of the Federal Rules of Evidence and is based on the rationale that such evidence is not relevant to the issue of liability, because liability should be judged at the time the event occurred rather than at some subsequent point in time.

[5] S. 100 avoids this undersirable result by establishing an unambiguous fault-based standard with regard to responsibility for harms caused by a product's allegedly defective design or formulation or by alleged failure to warn of product hazards.

like the product sellers they insure, are unable to accurately predict potential liability due to the disparity in state laws. Consequently, their rates are set conservatively to cover a "worst case" situation. In some instances, the rates are so conservative that product sellers are precluded from obtaining affordable coverage.[6] Without insurance, product sellers may be bankrupted by a single product liability judgment—or worse, injured claimants may have no way to fully recover their damages.

Thanks to this Committee's initiative and the leadership of Senator Kasten, the insurance aspect of the product liability problem was addressed by the passage of the Risk Retention Act of 1981 (P.L. 97-45), designed to provide an equitable market solution to the problem of affordable product liability insurance coverage. The Act facilitates the ability of product sellers to form self-insurance groups and purchase commercial insurance on a group basis. This additional competition in the insurance market will help ensure that product liability rates, now and in the future, will be determined on an accurate basis. However, the ability of businesses to self-insure is only a partial, albeit important, solution to the overall problem of affordable, available coverage. Insurance costs will remain high as long as the scandalously high transaction costs associated with product liability lawsuits continue—and they will, as long as there remains a wide variance and a total uncertainty in and among state laws.

When we last appeared before this panel two years ago, we noted that the price of product liability insurance premiums for our members had, on the whole, stabilized. Since that time, however, warnings have come from the insurance industry that annual record underwriting losses, coupled with a reduction in interest rates (and thus investment income), would produce a substantial tightening of product liability insurance premiums. Those warnings have now become a fact.

Results of NMTBA's Tenth Annual Product Liability Survey indicate that insurance premiums have increased substantially from last year.[7] The committee may be aware that average premiums rose sharply during the late 1970's, hitting a peak in 1979. Premiums have reduced significantly since then, as interest rates escalated and insurance underwriters competed for premium dollars to invest. However, premiums rose this year for the first time since 1979, and further increases have already begun to occur. Unlike the past several years when about half of NMTBA's members were able to negotiate premium reductions, only 24 percent were able to do so this year. Accordingly, we can anticipate a return to the precarious days when one-fourth of NMTBA's membership was completely without coverage.

My own company's experience illustrates that this alarming scenario is a very real possibility. After being unable to obtain insurance during the "peak" period of 1976-8, we were able to secure coverage when rates came down several years ago. However, as I sit here before you today, we are again facing the frightening prospect of operating on an entirely uninsured basis. Our current coverage expires in mid-April. We are, of course, making every effort to find affordable insurance; but I honestly don't know whether we will be successful. And, as we noted earlier, nobody wins in circumstances like these—not the manufacturer; not injured claimants, who may be left uncompensated if all the manufacturers' resources are depleted; and not the public, who may be denied access to products. The only winners under the current situation are the lawyers.

S. 100: WHAT IT WOULD DO—WHAT IT WOULD NOT DO

It was argued by some that early drafts of the Product Liability Act were unfairly weighted to accommodate the interests of product liability defendants. We remind the Committee that the legislation has been substantially revised in order to address these concerns. In this regard, Senators Kasten, Gorton, Danforth, Inouye and others who last year voted to favorably report the bill from this Committee worked diligently to arrive at an equitable compromise. S. 100, as a reflection of those efforts, is a fair and balanced proposal. However, because some confusion persists concerning what this important legislation is all about, we thought it might be helpful to briefly review the major provisions of S. 100.

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[6] During the peak of the product liability insurance crisis in the mid-1970's, approximately 25% of NMTBA members—including my own company—were unable to obtain afforable coverage, and thus were "running bare" during that period.

[7] The average premium—based upon 97 returns—is $59,000 (up 31% from $45,100 in 1984). The average metal-forming premium is $93,600, while the average metal-cutting premium is $42,800. Four out of ten respondents have deductibles or self-retentions averaging $70,400. Seven percent have no insurance at all!

What S. 100 Will Do:

S. 100 will achieve national uniformity because the decisions of federal courts interpreting the Act will establish guiding precedent for state courts.[8] As uniformity is thereby achieved, litigation of settled questions will diminish and legal costs will be reduced. As noted earlier, this reduction in legal costs will, in turn, stabilize the product liability insurance market.

The cost reductions brought about by uniformity will result in lower consumer prices.

S. 100 protects consumers by holding manufacturers strictly liable for construction defects and misrepresentations.

S. 100 holds manufacturers liable for harms caused by the manufacturer's failure to use a safe design and the failure to provide an adequate warning about a dangerous aspect of the product. In this regard, the bill holds manufacturer's to a stringent standard of conduct. They must use the "care, attention, knowledge, intelligence and judgment that society requires of its members for the protection of their own interests and the interests of others." This standard is flexible in the sense that it expands to reflect scientific and technological innovation. It therefore promotes safety.

S. 100 states the standards of liability in straightforward terms readily understandable by juries. This clarity will simplify the claimant's burden of proof and, by providing greater certainty, will afford more effective guidance to manufacturers in the design of their products.

S. 100, by adopting principles of "pure" comparative responsibility, permits claimants to recover some damages even if they contributed significantly to their own injury. The law in many states currently precludes this result.

S. 100, by adopting a very liberal form of "discovery rule", permits claimants to bring product-related actions within two years from the date they discover both injury and cause, regardless of the number of years which have elapsed since the manufacturer made the product—also a result now precluded by the law in many states.

As noted earlier, S. 100 encourages safety by prohibiting any improvements in warning or design from being offered as evidence that an older product was defective.

Finally, S. 100—by ending usually fruitless litigation concerning overage capital goods and by reforming the current subrogation scandal, will reduce transaction costs, eliminate unfairness, and improve workplace safety.

What S. 100 Will Not Do:

The greater clarity provided by S. 100 will not obliterate existing standards governing design and warning liability in the vast majority of states. As noted above, most states, although sometimes referring to "strict liability" in design and warning area, in fact apply a fault-based analysis.[9] This is so because most courts have, correctly, recognized that the condition of a product cannot be properly evaluated without assessing the conduct of the manufacturer who produced it.

S. 100 will not change the law with respect to risks or harms that are not discovered until sometime after the product was made. S. 100 follows the prevailing rule that a manufacturer is liable for harms caused by a design or warning defect only if he knew or *should have known* of the alleged danger when the product was made. This does not amount to an "industry standards" defense, which, in essence, relies on that which was actually known. In addition, the bill makes clear that the manufacturer has a continuing duty to remain apprised of scientific advancements and newly-discovered product hazards and, if a reasonable person would do so, to warn about those dangers discovered after the product has left his control. This is an important consumer protection presently not afforded by the law of some states.

S. 100 will not preclude persons injured by asbestos, DES, or other products that may cause latent injuries from litigating their claims if they did not know who made the product. This new and developing area of the law is left to the states. (In fact, the bill's statute of limitation will, in some states, expand the ability of these claimants to bring their cases to court.

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[8] S. 100 does not, however, in any way expand or change the jurisdiction of federal courts in product liability cases, as some product liability proposals under circulation would do.

[9] *See*, Powers, *The Persistence of Fault in Products Liability*, 61 Texas Law Review 77 (1983). A very few states appear to apply a standard which amounts to absolute liability. It should be recognized that where their actions may be judged without regard to whether they were at fault, manufacturers face considerable disincentives to improve the design or safety of their products.

S. 100 will not shield wholesalers, distributors, retailers and other product sellers who are not manufacturers from liability. they too would be liable for harms caused by failure to use reasonable care, misrepresentations and in cases where the plaintiff is unable to sue the manufacturer.

S. 100 will not reduce the amount of damages paid to persons injured by defective products. The bill in no way restricts the amount of compensation recoverable by a claimant harmed by a defective product.

As discussed below, S. 100 will not reduce the recovery of employees injured in the workplace. The bill does not affect how much workers receive or how much employers should pay under worker compensation statutes.

THE WORKERS' COMPENSATION SYSTEM AND THE LAW OF PRODUCT LIABILITY: A COLLISION IN THE WORKPLACE

Product-related accidents can essentially be divided into two categories—consumer accidents and workplace accidents. Because work-related injuries comprise a considerable portion of all product liability litigation,[10] the workers' compensation system necessarily comes into play. As a result, what we have in the workplace is the collision of two trends of legal theory: workers' compensation—a self-contained no-fault system under which the injured employee is assured statutorily prescribed benefits; [11] and traditional product liability tort law—a reparations system based on the concept of responsibility for fault.

Problems have arisen because these two very different systems come into conflict virtually every time a workplace accident occurs. The following explanation tells why:

"The injured employee can file a claim under his state's workers' compensation program, but the amount of his recovery is specifically limited by statute. However, while he is barred by [most] statutes from bringing a lawsuit against his employer, he may seek additional recovery by bringing an action against a third party such as the manufacturer and/or seller of the machine or other product by which he was injured. The ability of the product manufacturer or other third party to defend himself and to seek to bring the employer into an action is directly controlled not by common law principles of negligence or strict liability, but by the workers' compensation statutes of the state in which the suit is brought. The interaction of these two systems—product liability and workers' compensation—directly affects the total costs and the allocation of the costs of the workers' compensation system." [12]

Our discussion this morning will document that this interaction between the two systems has resulted in an unfortunate situation characterized by egregious imbalance, excessive transaction costs, and—most alarmingly—substantial disincentive for employers to provide and maintain safe working conditions.

Section 10 of S. 100 deals effectively with these problems in a straightforward and equitable manner. NMTBA is confident that the approach fashioned by Section 10 will enhance workplace safety and significantly reduce current litigation costs without diminishing an employee's right to collect workers' compensation benefits or to recover in a product liability claim against a third party. In addition, we understand that the insurance industry has indicated that the reduction in transaction costs brought about by the adoption of Section 10 would help reduce and stabilize insurance costs for sellers of workplace products. We believe, therefore, that as an essential element of S. 100, Section 10 merits our careful analysis this morning.

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[10] The Insurance Services Office (ISO) study on closed claims revealed that 42% of the dollars paid out by insurers stemmed from work-related incidents, although these incidents comprised only 11% of the claims.

[11] The social policy which initially prompted the establishment of workers' compensation benefits was based on a trade-off: in exchange for surrendering the right to sue his employer in tort, the injured employee receives payments pursuant to a set compensation schedule based on the nature and degree of injury. Thus, workers' compensation replaced the costly, time-consuming, and often uncertain tort litigation proces with an administrative remedy assuring, in most cases, that an injured worker will receive adequate compensation for injuries sustained in the course and scope of employment. Compensation is guaranteed regardless of who may have been at fault, including the injured worker. The third party defendant did not enter into the original scheme, because when workers' compensation was first negotiated in the early 1900's (and for many years thereafter), privity requirements and other contractual prerequisites generally prohibited injured employees from bringing product liability claims against a manufacturer or product seller. It was not until much later that most states had abandoned the privity rule. The interaction of workers' compensation and product liability tort law is, therefore, a fairly recent development.

[12] Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977, Wisc. L. Rev. 1035, 1036 (1977).

A. Subsection 10(a): Prevention of Double Recovery

Subsection 10(a) codifies the effect of existing law in virtually every jurisdiction by ensuring that an injured employee does not receive "double recovery" through a combination of workers' compensation benefits and the award of damages in a product liability lawsuit. In such cases, the amount of workers' compensation benefits is simply subtracted from the claimant's total damages.

It is important to clarify that subsection 10(a) does not in any way alter the amount of workers' compensation benefits due an injured employee, nor does it affect the employee's ability to recover damages for a product liability claim. Most important, it is simply a codification of current practice in virtually every state. Thus, it does not reduce the total amount of reparations currently available to injured workers. We support the double recovery language as a fair provision which merely tracks current law in preventing an unintended windfall.

B. Subsection 10(b): Eliminating the Subrogation Lien

The "egregious imbalance" of which we spoke earlier is best typified by the subrogation lien, a vehicle through which an employer who fails to maintain a safe workplace can pass along his workers' compensation costs to a product manufacturer. In most jurisdictions, the subrogation lien goes into effect regardless of employer fault. Before discussing subsection 10(b), we feel that a brief overview is in order so that the impact of this provision can be readily appreciated.

Typically, subrogation works like this: The employee, after sustaining a workplace injury, first receives worker compensation benefits from his employer and then may bring suit against a third-party—usually the manufacturer of the equipment which is involved in the injury. Subrogated to the employee's tort claim is the employer's claim for recoupment of the amount paid out in compensation. In most states, the exclusive remedy provision of the worker's compensation statute precludes the third-party from an action against an negligent employer for contribution or indemnity, so that the third-party pays the entire damages and the employer pays nothing.

The result is blatantly unfair: a negligent employer may, solely at the expense of the third-party manufacturer, avoid entirely the cost of an industrial accident—an accident for which the employer has, in most circumstances, been partially or completely responsible.[13]

My own company's experience is illustrative in this regard. In October of 1948,[14] Setco sold a small motor unit—not a complete machine—to a dealer who subsequently resold it to an employer. The employer built the fininished machine using our components along with a large portion of components manufactured by the employer himself. Although the employer recognized that the machine, as completed, was unsafe because it lacked a guard, it permitted its employees to use the machine for approximately 29 years prior to the injury which inevitably occurred—an injury which resulted in Setco being named as a party to the law suit. The claimant sought damages against Setco for $400,000. The employer instituted a subrogation claim for more then $35,000. Although we ultimately were able to negotiate a settlement with the claimant, the employer's insistence on subrogation considerably prolonged this process. The end result: an expense to us exceeding $140,000 and 7 years of aggravation—all in relation to a machine we did not build and an injury for which we were in no way responsible. Clearly, the system is not working when results such as this are permitted to occur—and my company's experience is typical of what most manufacturers of capital goods encounter with regrettable regularity.

There is no question that the subrogation lien has fostered excessive legal costs. Commenting on the mechanics of the loss-shifting process, one observer has noted that third-party suits (including subrogation claims) are primarily "sources of income for attorneys." [15]

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[13] The ISO claims study indicated that 57% of the dollars paid out by insurers in work-related incidents involved situations in which employer fault was a factor. The actual number of claims involving employer fault would be much higher, since substantial dollar awards are normally paid in cases involving clear (and sole) manufacturer fault.

[14] The initial sale occurred in 1948. A suit was filed against Setco in 1979; we settled in 1984. We cite the case here as an example of workplace inequities, but the litigation is equally relevant as an illustration of the "long-tail" claims problem faced by most machine tool manufacturers. *See*, Section VI., *infra*.

[15] Davis, *Third-Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent—Where Do Dole and Sunspan Lead?*, Vol. 4 Hofstra L. Rev. 571, 585 (1976).

The subrogation lien poses another major concern as well—that of workplace safety. Employers, unlike manufacturers, are in a unique position to control the workplace environment; they are responsible for seeing that equipment is properly maintained and safeguarded, and that employees are adequately trained in the safe use of industrial machinery. The subrogation lien, which permits a negligent employer to pass along the costs of an industrial accident to a third-party manufacturer who exercises little or no control over the circumstances under which the accident occurred, clearly acts as a disincentive to workplace safety by shifting the focus away from accident prevention where it will do the most good—in the workplace. As one commentator has recently observed:

"The third-party manufacturer may be able to bear the loss but should not because the real ability to control the safety of the work environment rests with the employer. This is one of the most critical faults of the present overlap between products liability and workmen's compensation. If injury is to be prevented, *the one who is in fact able to prevent the loss must have an incentive to prevent it*, and frequently this is the employer rather than the manufacturer or seller".[16] (Emphasis added.)

From NMTBA's perspective, what all this adds up to is a situation in which unsafe work practices in unsafe workplaces, maintained by unsafe employers, are causing working men and women to lose fingers and hands—or worse—and our members are paying for it.

Subsection 10(b) eliminates the unfair, unsafe and expensive results of the subrogation system by prohibiting the employer (and its worker compensation insurance carrier) from pursuing a subrogation lien, except where the manufacturer or product seller has specifically agreed to hold the employer faultless. This provision does not affect an injured worker's ability to recover either workers' compensation benefits or a product liability damage award. It simply makes clear that the costs of the workers' compensation system will be paid by the employer—as was originally intended—and not by the tort litigation system.

We believe that subsection 10(b), when viewed in the context of Section 11 as a whole, strikes an equitable balance. The employer, in exchange for giving up his right to pursue a subrogation lien, receives substantial reinforcement of the immunity shield traditionally afforded by the workers' compensation system. As noted below, it is a shield which has recently begun to crumble.

C. Subsection 10(c): Eliminating Third-Party Recovery Against the Employer

Subsection 10(c) prevents (as the majority of states now do) a manufacturer from bringing third-party suits against the employer. Most states do not permit contribution or indemnity suits, under which manufacturers and product sellers may recover from a negligent employer all or part of a product liability judgment.

Generally, these jurisdictions have interpreted the "exclusive remedy" provision of the workers' compensation statutes to preclude such suits. In recent years, however, several states have permitted product sellers to recoup product liability awards when the employer's negligence has caused or contributed to the employee's injury.[17] Under this approach, the employer bears the cost of defending himself, while the product seller bears the litigation costs associated with bringing the claim.

These cases help our members and at one time, NMTBA supported this approach. However, we recognize that the goal of recouping our losses is achieved at the expense of an added lawsuit and higher transaction costs. We are also aware that unlimited contribution and indemnity suits are an indirect breach of the workers' compensation immunity. In this regard, the Committee may recall that Professor Arthur Larson, the leading authority on the law of workers' compensation, appeared before this panel two years ago to advocate that both subrogation and third-party recovery against the employer should be abolished.[18]

For these reasons, we support subsection 10(c), when taken together with subsections 10(a) and 10(b). These provisions will substantially reduce transaction costs, since the provisions effectively "cancel out" attempts by both employers and prod-

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[16] Carpenter, *Products Liability—An Analysis of the Law Concerning Design and Warning Defects in Workplace Products*, 33 S.C. L. Rev. 273, 292 (1981).

[17] *See, generally, Dole* v. *Dow Chemical Co.*, 130 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 283 (1972); *Skinner* v. *Reed Prentice Division Package Machinery Co.*, 70 I11.2d 1, 374 N.E.2d 436, *cert. denied*, 436 U.S. 946 (1978). (However, the effect of the *Skinner* decision appears to have been somewhat modified by the Illinois Legislature which eliminated contribution among joint tortfeasors. *See*, ILL. REV. STAT. Ch. 70, Sec. 30-2 (1979).)

[18] *See*, Congress, Senate Committee on Commerce, Science, and Transportation, Statement of Professor Arthur Larson, April 27, 1983 before the Consumer Subcommittee (98th Cong., 1st Sess.)

uct sellers to recoup their respective losses by suing each other. Workers' compensation benefits which accrue to the employee would remain unchanged.

D. Subsection 10(d): Intentional Torts and Employer Liability

The workers' compensation system traditionally has required that the statutorily prescribed benefits which an employee receives comprise the *exclusive remedy* for work-related injury, the employee having forfeited any common law claim in tort against the employer. While the overwhelming majority of states has maintained this view, a very small minority of courts have recently veered from the exclusive remedy principle by permitting compensation-covered employees to bring suit directly against their employers. For example, a few states have imposed liability on employers whose failure to comply with safety standards resulted in an employee's injury.

The Supreme Courts of West Virginia and Ohio each determined that employer misconduct under these circumstances amounts to an "intentional tort" against an employee.[19] This determination represents a pronounced departure from clear and long-standing precedent. The courts' analysis varies substantially from traditional tort law, which holds that merely knowing and appreciating a risk is not the same as having the intent to cause injury. Conduct undertaken with the knowledge that danger is likely to result therefrom may be "reckless" or "willful," but does not rise to the level of an "intentional tort."

In addition, the Ohio Supreme Court recently expanded this theory by permitting workers to sue their employer where an act of the employer made in injury "substantially certain" to occur and by permitting workers in such suits to receive both worker compensation benefits and civil damages.[20] The facts underlying these cases look like negligence and not classical intentional wrongdoing, such as striking an employee.

NMTBA views these developments as a disturbing and unwarranted intrusion into the employer's exclusivity shield. And it is important to note that this judicial theory of employer liability has not fared very well, having proved to be cumbersome, entirely unworkable and a substantial disincentive for potential employers to locate (or indeed, remain) in those jurisdictions.[21]

Subsection 10(d) states that the Act is not intended to change worker compensation laws that allow claimants to sue their employers where the harm was caused by the employer's "intentional tort." The bill, however, does not define that conduct which constitutes an "intentional tort." In light of the recent propensity of a few courts to unnecessarily expand this concept of liability, we urge that the Committee report contain language clarifying that while S. 100 is not intended to preclude worker suits arising out of employer torts which are "intentional" within the traditional meaning of that term (e.g., battery, assault, false imprisonment, etc.), the bill should not be interpreted to countenance the expansion of the intentional tort concept beyond that tradition. We support such a clarification as a necessary reinforcement to the employer's traditional immunity from tort liability and as an essential element of the overall compromise achieved by Section 10.

We view Section 10 as the productive outcome of consensus achieved over the past several years among workplace suppliers, employers, labor unions, and insurers. To a considerable degree, it balances the need for equity (for all parties) and the desirability of reduced transaction costs. We commend Senator Kasten and the Committee staff for their persistent efforts to fairly address this complex and controversial issue.

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[19] *See, generally, Mandolidis v. Elkin Industries, Inc.*, 246 S.E.2d 907 (W. Va. 1978) (substantially overruled by statute); *Blandenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608 (1982). Both of these cases are based on the premise that an employer's failure to comply with safety standards constituted "reckless disregard" which resulted in employees being injured.

[20] *See, Hamlin v. Snow Metal Products, Inc.*, Ohio St. 2d (1984); *Gains v. City of Painesville*, Ohio St. 2d (1984).

[21] In this regard, West Virginia enacted legislation which returns to a more traditional definition of "intentional tort" than the vague standard set forth by the West Virginia Supreme Court in 1978. The Committee may be interested to know that following the 1978 court decision, West Virginia employers were besieged with hundreds of lawsuits filed by injured employees who receive workers' compensation benefits and then seek to recover additional compensation through the courts. The legislation was based on the recommendations of a state commission, appointed by the Legislature to find a legislative remedy which would stem the tide of "frivolous" lawsuits filed by employees since the 1978 ruling.

EMPLOYER FAULT AS A SUPERSEDING CAUSE

Another provision of S. 100 bearing directly on workplace liability is Section 9(f) which adopts current law by providing that conduct of the claimant's employer (or co-employee) is to be considered only on this issue of whether that conduct was a superseding cause of the claimant's harm. If such conduct is found to be a superseding cause of the harm, the defendant is not the responsible party. It should be recognized that present law applies in all states the same rule of supersending cause to all persons—not just employers—and to all tort cases—not just product liability cases. The underlying rationale is readily understandable: one person should not pay for harms caused by another.

S. 100 clarifies the superseding cause provision for employers because the bill states that in every other respect employer conduct may not be considered by the trier of fact. These provisions eliminate the doctrine of "equitable apportionment" under which the manufacturer does not pay for any percentage of harm attributable to the employer. Although earlier drafts of the bill included "equitable apportionment" language, that language was subsequently deleted at the request of organized labor and others. Now S. 100 simply codifies the current law requirements that employer responsibility for harm be "ignored" except where it constitutes the superseding cause of the harm. Although preferring the original "equitable apportionment" language, NMTBA supports the bill's clarification of this traditional rule of law.

TIME LIMITATION ON LIABILITY

A. Statute of Repose

From our industry's perspective, another major source of the imbalance which today characterizes most product liability litigation is the fact that machine tools enjoy such longevity of use in the industrial workplace. It is not unusual for a machine tool builder to be sued in connection with a machine produced more than one-half century ago—a machine which may have changed hands several times and which the manufacturer does not even know is still in existence.

My own company, for example has defended product liability claims related to machinery manufactured as long ago as 1935. Our defense of these claims—while successful—has resulted in substantial legal expenses, due largely to the fact that such claims are inordinately burdensome to litigate because of the difficulty of obtaining records and other evidence necessary to establish liability, or the lack thereof.

In our view, it is unfair to continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age. Section 11 of S. 100 remedies this unfairness by establishing a 25-year time limitation on liability for harms caused by capital goods alleged to be unsafe in design or formulation, or harms caused by an alleged lack of adequate warnings or instructions. The time limitation begins to accrue from the date the product was delivered to its first purchaser or lessee who was not engaged in a business to sell or lease the product or to use the product as a component part. This provision is based on the rationale that "establishment of an outside time limit on liability recognizes that claims brought at an unreasonably late date after initial delivery place an unwarranted burden on trade, represent a wasteful use of judicial resources, and are unfair to manufacturers, product sellers and consumers alike.[22]

Any period seclected will necessarily be subjective. A period which is too short would be "unfair" to some claimants. By the same token, a period which is too long would be "unfair" to product sellers and would result in needless litigation and excessive transaction costs.

Some have objected to this provision on the grounds that it unfairly and absolutely cuts off an injured person's right to pursue any product liability claim. This simply is not the case. First, the 25-year statute of repose established by Section 11 is a limited one, pertaining only to capital goods—that is, assets depreciable under ACRS (excluding motor vehicles and other modes of passenger transportation) which are used in a trade or business, held for the production of income, or sold, leased, or donated for training or demonstration purposes. Further, the time limitation applies only to product liability claims which allege defective design or warnings. Therefore, if a person's injury resulted from a product which was mismanufactured (flawed according to the manufacturer's own standards), or a product which failed to perfore according to a manufacturer's express warranty, the 25-year time limitation would

[22] S. Rep. 98-476, *supra*, at 52.

not apply. And it is important to note that the time limit on liability established by S. 100 is apporoxiately two and one-half times as long as the period set forth in most state statutes of repose.

In addition, the statute of repose is subject to three very important exceptions. First, the provision does not apply if a substantial cause of the claimant's harm was the product seller's intentional misrepresentation of facts or the fraudulent withholding of information. Second, the provision does not apply if the harm resulted from the claimant's prolonged exposure to a product—asbestos, for example. Third, the provision does not apply if the product liability claim arises from a latent harm—that is, a harm caused within the 25-year period, but which was not discovered until after the period expired. This exception is specifically designed to include carcinogenic harms, which typically require a lengthy period of time before they become evident.

Also relevant to the criticism that this provision will "close the courthouse door" is the fact that very few valid claims will be eliminated, because the overwhelming majority of lawsuits involving older products are without merit. As a matter of common sense, if a piece of heavy machinery has operated without incident for over 25 years, how likely is it that the original builder is responsible for an accident involving that equipment? It is virtually certain that the accident is due to product misuse, alteration, or fault on the part of the employee (or his employer). What the statute of repose does, as a practical matter, is to put an end to legal costs incurred by both sides in battling over issues concerning old, tired and often altered or misused products.[23] It will not result in the widespread reduction of "valid" claims.

In addition, the majority of injuries involving capital goods occur in the workplace. Because nearly 90% of the U.S. labor force is covered by worker compensation statutes, there is little likelihood that a person injured in the workplace will go entirely uncompensated, since those injured after the 25-year period would be eligible to receive workers' compensation benefits.

For these reasons, NMTBA strongly favors a statute of repose for capital goods.

B. Statute of Limitations

Section 14 provides that civil actions brought under S. 100 must be filed within two years of the time the claimant discovers, or in the exercise of reasonable prudence, should have discovered the harm and its cause. Actions filed more than two years after the harm and its cause were or should have been discovered are barred.

The bill's statute of limitation is beneficial to claimants because it ensures that a claimant will not be barred from filing a lawsuit before the harm and its cause are discovered. This protection is especially important in product liability claims alleging harms which are latent or the result of prolonged exposure. For example, asbestos-related harms typically fell within this category. Currently in some states, such as New York and South Carolina, the statute of limitation may expire before the claimant can reasonably discover both his harm and the cause of that harm. S. 100 avoids this harsh result.

This provision, applying as it does to latent injuries, is unlikely to affect the machine tool industry, where injuries are traumatic in nature and, therefore, immediately discoverable. However, we call the provision to the Committee's attention in order that it may further recognize the extent to which this legislation promotes fairness in the law of product liability.

WARNINGS GIVEN IN THE WORKPLACE

Concern has been expressed that under Subsection 6(d) of S. 100, warnings regarding a product need only be given to a worker's supervisor and not to the worker himself. We believe these concerns do not reflect an accurate understanding of the bill's provisions.

The bill follows the overwhelming majority view as well as The Restatement (Second) of Torts by requiring that warnings be given directly to the employee himself unless, in light of practical and economic difficulty and diminished likelihood that the product would cause harm (including the probable seriousness of that harm), a reasonable person would have given such warnings or instructions to an employer. The bill makes clear that warnings which are given to employers must be adequate.

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[23] Recent machine tool industry statistics indicate that approximately 31% of the claims would be eliminated if the 25-year statute of repose for capital goods contained in S. 100 were adopted.

NMTBA supports this provision as a fair and balanced way of addressing the realities of actual workplace practice. It adheres to the prevailing rule of law that a warning must be given to the person best in a position to act on the warning and thereby avoid the harm. The fact is that in most instances, that person is the product user. However, in some situations, it is not. Whether or not warnings may be transmitted to a third person, such as an employer, depends in part on whether that person can reasonably be expected to take adequate steps to avoid the product user's harm or to ensure that the risk of harm is communicated effectively to the product user. The determination of whether such steps were within the realm of "reasonable" conduct will of course, vary with the facts of each case. In this way, the provision affords sufficient flexibility without compromising the safety of product users.

ALTERNATIVE METHODS OF COMPENSATION

Enactment of uniform product liability rules will eliminate the inordinate confusion which now pervades this area of the law. However, some have expressed concern; that codification of product liability rules may result in a loss of adaptability with regard to those persons who sustain product-related injuries but who do not—or should not—recover damages under the tort litigation system.

This is considerably more rampant in the present system because of confusion and uncertainty in the law, forum shopping and arbitrary shifts in the law due to changes in judicial personnel. S. 100 combines stability with needed flexibility. By holding manufacturers to that standard of care which "society requires," the bill permits courts to readily adapt its fault standard to take account of newly developed safety technologies.

Under any tort system, there will be some people who are injured by products who cannot—and, in some instances, should not—recover tort damages. This is true under S. 100 and it is true under current law. What should be done for those persons?

We believe the appropriate response was enthusiastically adopted (by a vote of 14-2) by this panel last year. Section 18 of S. 100 provides for the creation of a Product Liability Review Panel to evaluate legal remedies available to persons injured by products. S. 100 specifically directs the Panel to make recommendations regarding appropriate methods of compensation to persons injured by products without regard to fault.

This approach implicitly recognizes that in order for any meaningful compensation mechanism to be developed, the law must first be stabilized. This is so because the structure of any such mechanism must necessarily reflect the current law since it is the alleged "shortcomings" in the law which give rise to alternative methods of compensation. The current chaotic nature of product liability law makes an accurate determination of these shortcomings virtually impossible. Enactment of S. 100 will clarify the law. Actual experience under that law will permit a more accurate assessment of the degree to which alternative methods of compensation are necessary—and, indeed, if they are necessary at all.

Thus we believe that moving forward with a compensation mechanism before clarity in the law has becen achieved is untimely and, consequently, ill-considered. Section 18 of S. 100 provides, therefore, a thoughtful and adequate safeguard.

CONCLUSION

My comments this morning have demonstrated that the interstate nature of products distribution demands a federal solution. We believe that S. 100 represents that solution—a set of fair and balanced rules which will establish uniformity and restore clarity and certainty to a system too long characterized by erratic, inconsistent and inequitable results. S. 100 accomplishes this objective without in any way diminishing the rights of product users. The bill requires that manufacturers be held to a stringent standard of care—thus there is nowhere for a negligent manufacturer to "hide" in this legislation.

Product liability is a problem which simply will not go away. Prompt approval of S. 100 will enable this Committee to deal with the problem in a manner which is both fair and effective. We therefore urge the Committee to favorably report S. 100 at the earliest possible date.

Thank you. I would be happy to respond to your questions.

Senator KASTEN. Mr. Wagner, we thank you very much.

The next witness is Mr. Robert Larsen, who is the president of the Insurance Administration Center. Mr. Larsen.

Mr. LARSEN. Thank you, Chairman Kasten and Senator Hollings, for the opportunity to appear to present my views regarding the current situation affecting the price and availability of product liability insurance and to explain why I believe passage into law of S. 100 is critically important.

I am president of the Insurance Administration Center of Park Ridge, IL. We advise small businesses in matters relating to loss prevention and risk management concepts, and are presently identified as insurance consultants to some 90 national trade associations with approximately 45,000 member companies across the United States.

It occurs to me that I am, perhaps, the only advocate of this bill speaking as an uncompensated person at this hearing, which if the bill is enacted into law will have my compensation reduced. Insurance agents and brokers actually to some extent enjoy the benefits of the chaos in the marketplace because increasing premiums increase agent/broker commissions.

The insurance market is continuing to deteriorate. Once again, we are on the verge of what can only be characterized as a crisis. Literally hundreds of insurers are limiting new risk assumption and raising prices across their present client base by upwards of 40 percent. Many carriers have stopped writing new business altogether while they assess the damage to their financial structure caused by two essential factors: The uncertain and unstable legal climate of the past decade and the inadequate insurance pricing of the past 5 years.

The market for primary and excess liability insurance coverage is in my opinion in disarray. Several insurers have been forced into either rehabilitation or outright liquidation in recent months. Major multinational corporations are ordering their insurance subsidiaries to discontinue writing outside insurance risks, while others have closed the doors of their captive companies completely.

As a result of this, some important reinsurers of product liability exposures have disappeared from the marketplace. The capacity crunch that has developed has been aggravated by a significant reduction in the excess and surplus lines activities of some insurance companies. Some have completely withdrawn from the market.

The most severely affected are small and medium-sized businesses. This is to some extent to be expected because insurers with limited capacity to insure are turning away from the smaller accounts in order to retain capacity so as to respond to the larger, target risks, handled for the most part by the national insurance brokers.

Mr. Chairman, I can hear the critics now. My guess is, as I have heard today, they will try to lay the blame for some of this unhappy state of affairs entirely at the doorstep of the insurance industry, and will argue that Federal liability tort reform along the lines proposed in S. 100 is not necessary.

Quite frankly, it is clear that underwriters should have increased prices as early as 1981. However, at that time some of the marginal underwriters, backed by inexperienced foreign reinsurers that were chasing the strengthening U.S. dollar, were forcing domestic insurers into a price war in order to maintain market share.

No one, either inside the insurance industry or out, predicted, with any accuracy, the severity of developing losses that we have

finally come to realize in 1983 and 1984. Hindsight is almost always 20–20 and we can now look back at developments that were beyond the reasonable forecasting capability of actuaries and which have proven to be major contributors to the current dilemma.

These include: No. 1, deregulation of commercial insurance pricing, with the result that traditional financial analysis has generated conflicting signals to the actuaries.

I like to think that if it was a manufacturing situation and you were looking at the financial statement, where you came to the entry for "cost of goods sold," someone would have inserted "to be determined later."

Point No. 2, the significant decline in actual short-term interest rates, which, while healthy for the economy overall, has limited the ability of insurers to offset underwriting losses with investment gain.

No. 3, there is the strength of the dollar against the currencies of our major foreign re-insurance markets. With underwriting results showing record losses, the strength of the dollar has had the effect of diminishing foreign reinsurance capacity. This problem is compounded by the concern of foreign underwriters over the unpredictability of product liability and tort law in the United States.

No. 4, there is the exhaustion of deferred tax credits of domestic insurance companies which has created an additional negative impact on cash flow and, thus, on the capacity to insure.

No. 5, the amendments to the Internal Revenue Code which have made it more difficult for businesses to self-insure liability losses. As a result, these risks are returning to the insurance marketplace where major corporations are competing for declining capacity to insure.

Insurance consumers, particularly small- and medium-sized businesses, are literally begging for some bit of good news to present to underwriters. It is a fact of life that commercial insurance companies are awash in red ink. It is therefore understandable that those insurers would shy away from those risks lacking in predictability as to ultimate loss development.

Unless a uniform, stable, and fair product liability statute is enacted into law, insurance companies will probably never be able to charge a price sufficient to cover alarmingly expensive legal defense costs and subsequent awards to injured parties.

Mr. Chairman and members of the subcommittee, I believe we are in the 11th hour in the effort to secure favorable consideration of a Federal measure aimed at bringing uniformity and predictability to our product liability litigation system.

It would have been better for S. 44 to have been passed last year. This would have been a signal to insurers that we are about to turn the corner. During this era of expanding legislative as well as case law generated uncertainty, enactment into law of S. 100 would be a timely and major step toward reforming this Nation's product liability law, and I urge its passage.

[The statement follows:]

STATEMENT OF ROBERT L. LARSEN, PRESIDENT, INSURANCE ADMINISTATION CENTER, PARK RIDGE, IL

Chairman Kasten and Members of the Subcommittee. Thank you for the opportunity to appear this morning to present my views regarding the current situation affecting the price and availability of product liability insurance, and to explain why I believe passage into law of S. 100 is so critically needed.

I am Robert L. Larsen, President of the Insurance Administration Center, Park Ridge, Illinois. The IAC advises small businesses in matters relating to loss prevention and risk management concepts, and is presently employed as insurance consultant by some 90 national trade association with member companies located across the United States.

First, let me take a moment to review just what we are witnessing in the insurence marketplace today.

For more that two years, consumers of property-casualty insurance waited for the insurance cycle to return to higher pricing, policy restrictions, and cancellations, following a few years of relative stability. This has happened, and we can trace the onset of the change in the marketplace back to the second quarter of 1984. At that time, the long-awaited "hardening" of the insurance market began to have its impact on the pricing and availability of the various lines of commercial insurance that had been generating losses for underwriters in recent years. Since that "hardening" occurred, we have found that the line of commecial insurance that is the most difficult to renew with current underwriters and the most expensive to place in new markets is general liability insurance. And the most significantly and adversely affected by this development are small and medium-sized businesses with any significant product liability exposure.

Sadly, the insurance market is continuing to deteriorate today and, in my judgment, we are, once again, on the verge of a crisis. Literally hundreds of insurers are limiting new risk assumption and raising rates across their present client base by upwards of 40 percent. Many major carriers have stopped writing new business altogether while they assess the damage to their financial structure caused by two essential factors: the uncertain and unstable legal climate of the past decade; and, the inadequate insurance pricing of the past five years.

Additionaly, I believe it is fair to say that the reinsurance market for primary and excess liability coverage is in disarray. Several major insurers have been ordered either into rehabilitation or outright liquidation. Major multi-national corportions are ordering their insurance subsidiaries to discountinue writing outside insurance risks, while others have closed the doors to their captive insurers. As a result, some important reinsurers of product liability exposures have virtually disappeared.

The "capacity crunch" that has developed due to these decisions has been aggrevated by a significant reduction in the excess and surplus lines activities of some companies and, on the part of others, complete withdrawal from that market.

When viewed in this comprehensive context, it should come as no surprise that high limit general liability and product liability coverage has become, at a minimum, exceedingly expensive. For many businesses, coverage is literally unavailable.

As I previously indicated, the most severely affected are small and medium-sized businesses. This is because insurers with limited "capacity to insure" are turning away from smaller accounts in order to retain capacity so as to respond to the larger target risks handled, for the most part, by the national insurance brokers.

Mr. Chairman, I can hear the critics now. My guess is they will try to lay the blame for this unhappy state of affairs entirely at the doorstep of the insurance industry and argue that Federal product liability tort reform along the lines proposed in S. 100 is not necessary.

Quite frankly, in retrospect it is clear that underwriters should have increased prices as early as 1981. However, at the same time marginal underwriters, backed by inexperienced foreign reinsurers chasing the strengthening dollar, were forcing domestic insurers into a price war in order to maintain market share, no one, either inside the insurance industry or out, saw the severity of developing losses.

Hindsight is almost always 20/20, Mr. Chairman, and we can now look back at developments that were beyond the reasonable forecasting capability of the actuaries, which have proven to be major contributors to our current dilemma. These include:

1. Deregulation of commercial insurance pricing with the result that traditional financial analysis has generated conflicting signals to the actuaries.

2. The significant decline in actual short-term interest rates which, while healthy for the economy overall, has limited the ability of insurers to offset underwriting losses with investment gains.

3. The strength of the dollar against the currencies of our major foreign reinsurance markets. With underwriting results showing record losses, the strength of the dollar has had the effect of diminishing foreign reinsurance capacity. This problem is compounded by the concern of foreign underwriters over the unpredictablity of product liability tort law in the United States.

4. The exhaustion of "deferred tax credits" of domestic insurance companies which has created an additional negative impact on cash flow and thus on capacity to insure.

5. Amendments to the Internal Revenue Code which have made it more difficult for businesses to "self-fund" liability losses. As a result, these risks are returning to the insurance marketplace, and major corporations are, therefore, competing for declining capacity to insure.

That said, I am absolutely convinced that enactment into law of S. 100, the Product Liability Act, is critical to both the near and long term ability of manufacturers and product sellers to manage their product liability loss exposures.

First of all, insurance consumers, particularly small and medium-sized businesses, are literally begging for some bit of good news to present to underwriters. It is a fact of life that commercial insurance companies are awash in red ink. It is, as a practical matter, at least understandable that those insurers would shy away from risks that lack predictability as to the ultimate loss development.

"Social inflation" brought on by uncertain and unstable legal doctrines provides a clear indication that unless a uniform, stable and fair product liability statute is enacted into law, insurance companies will never be able to charge a price sufficient to cover alarmingly expensive legal defense costs and subsequent awards to injured parties. Stated another way, it would, as a matter of pure logic, be highly desirable from an insurance point of view to replace the current patchwork of 51 different, always changing and oftentimes conflicting sets of product liability standards with a single set of clear and predictable product liability rules.

Mr. Chairman and Members of the Subcommittee, I believe we are in the Eleventh Hour in the effort to secure favorable consideration of a federal measure aimed at bringing uniformity, predictability and fundamental fairness to our product liability litigation system. The insurance industry is moving away from "occurrence basis liability policies" and toward "claims made policies" in an effort to put some measurement in place with respect to the calculation of ultimate loss. While I have sought in this testimony to emphasize the impact of these developments on small and medium-sized businesses, it is important to note that it is not just "Main Street America" that is facing a problem, but major corporations as well.

There is no doubt that it would have been better for S. 44 to have been passed last year. This would have been a signal to insurers that we are about to turn the corner ending years of expanding legislative as well as case law generated uncertainty. Nonetheless, enactment into law of S. 100 would be both timely and a major step toward reforming this nation's product liability law. I am deeply concerned that if Congress fails to act this year, we will face the disintegration of any semblance of an orderly risk sharing/risk transfer mechanism.

Therefore, I strongly urge passage of S. 100, a bill that would replace the current chaotic product liability system with uniform, clear, stable, predictable and fair standards.

Mr. Chairman and Members of the Subcommittee, I am honored to have been given the opportunity to testify here this morning and would be happy to respond to any questions you may have.

Senator KASTEN. Mr. Larsen, thank you very much for your testimony. The next witness is Prof. Joseph Page, Georgetown University Law Center.

Professor Page.

Mr. PAGE. Thank you very much, Senator Kasten. I would like to express my appreciation for the committee's inviting me here once again to present my views on the desirability of federalizing the law of products liability. And let me emphasize at the outset that I am expressing my own personal views and don't represent anybody here.

On this occasion, I would like to address one discrete aspect of the problem that I have not addressed before in my testimony on

this subject. S. 100 presumably seeks to solve, or to help solve, what has become known at the product liability crisis.

This crisis originally manifested itself in a form of skyrocketing insurance premiums product manufacturers were forced to pay in the mid-1970's to protect themselves against liability to persons injured by defective products.

As we have just heard, the high cost of product liability insurance premiums continues to plague product manufacturers and sellers. There are those who claim that S. 100 will somehow help stabilize or reduce these premiums. In my judgment, S. 100 will have no significant effect on insurance premiums. This is the conclusion that I reached in an article that was published recently in the Capital University Law Review, one copy of which I am submitting for the record.[1]

Let me explain very briefly the basis for this conclusion. The cost of product liability insurance rose steeply in the early 1970's, precipitating the crisis, but by the end of the decade, premiums came down to affordable levels.

Indeed, when Congress was considering the enactment of the Risk Retention Act, elements of the insurance industry lobbied against it on the ground that the product liability insurance crisis had abated. So by the end of the 1970's and the early 1980's, the product liability crisis seems to have disappeared.

In recent months, premiums have apparently begun to take off again. I think it is very significant that over the same period of time, there have been no significant developments in product liability law on the State level to explain these fluctuations.

There have been no significant changes in the levels of jury verdicts and settlements against manufacturers. What we have seen are other factors, and many of them were listed by the prior witness, which contribute to product liability insurance rates.

We saw a fall in the stock market in 1973 and 1974, causing insurance companies to sustain heavy losses in their investment reserves. To compensate for these losses, insurance companies sharply increased their rates. Similar economic indicators explained the drop in premiums in the late 1970's and also the recent increases. Indeed, in recent months, the overall insurance market has tightened up, and it is my understanding that all liability insurance rates are going up, not just product liability insurance rates. My point is that tort law, product liability law, the common law of product liability as modified by State statutes, has in my judgment had nothing at all to do with these fluctuations in product liability premiums.

If that is the case, then I would question very seriously whether changes in the system that would be brought about by S. 100 will have any significant impact on product liability premiums. We have heard a lot about the need for certainty to help solve the product liability problem or crisis. It seems to me that the only kind of certainty that would really help product liability insurance ratemaking is certainty in interest rates, certainty in inflation rates, and certainty in the levels of the stock market.

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[1] The publication is in the Committee files.

I don't believe that the tort law can contribute in any significant way to that particular process, and that is simply the only point that I wanted to make here this morning.

Senator KASTEN. Mr. Page, we thank you.

[The statement follows:]

STATEMENT OF JOSEPH A. PAGE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Advocates of S. 100 bear the burden of demonstrating a need for the federalization of an area of the law which has traditionally been left to the states. In my judgment, this burden has not been met.

Skyrocketing product-liability premiums in the mid-1970s created what has become known as the product-liability "Crisis," in response to which bills were introduced in the Congress to federalize product-liability law. Although the cost of product-liability insurance receded to affordable levels in the late 1970s, these bills took on a life of their own. S. 100 represents their current incarnation. Today we are again hearing about sharply-increasing premiums. Those who raise this point are presumably arguing that S. 100 is a solution to the problem.

My purpose this morning is to offer two propositions to this distinguished Subcommittee:

1. The case that extreme fluctuations in product-liability insurance costs result from either the excessive liberality of or the lack of uniformity in state product-liability law simply has never been made.

2. Therefore, it is logical to assume that the enactment of S.100 will have no demonstrable effect on premiums.

These propositions derive from a study which culminated in an article I co-authored in 1984 with Marcy M. Stephens in 13 *Capital Univeristy Law Review* 387 (Spring 1984) (a copy of which I have submitted for the record). Events which have occurred subsequent to the publication of the article—I refer to recent indications that product-liability insurance premiums have again taken off—serve merely to buttress the conclusions which we reached.

Much of the original furor over the product-liability "Crisis" turned out to rest upon factual misstatements or distortions. (I have documented some of these in an article entitled "Caveat Insurers," published in The Nation on May 3, 1980, and reprinted in the 1982 Hearings on S.2631 before this Subcommittee in 1982, at page 232.) It took the Interagency Task Force on Product Liability, chaired by the distinguished torts scholar Victor E. Schwartz, to document the true dimensions of the probelm. Premiums did increase sharply for some manufacturers, with the upturn adversely affecting small businesses more than large ones.

Although many blamed the tort system for the rise in costs, the Task Force offered a thorough criticism of insurance ratemaking and referred to the deleterious impact of what it called "panic pricing." The Task Force's insurance contractor discovered that a desire to accumulate new funds for investment at a time when the stock market was rising sparked a vigorous campaign by the insurance industry to attract new business in the late 1960s and early 1970s. This effort caused rates to be set too low for too long. When the stock market fell off in 1973 and 1974, insurance companies sustained heavy losses and had to offset them with substantial premium hikes.

In the late 1970s and early 1980s insurance premiums leveled or dropped. Insurance stocks and earnings recovered and rates became competitive. Climbing interest rates contributed to this process of stabilization.

Today premiums are apparently on the rise again.

There is no reason to believe that the tort system contributed at all to the decrease of product-liabilty insurance premiums at the end of the last decade, or to the increases which may currently be taking place. No correlation in the slightest exists between expansions or contractions of tort doctrine during these periods and the level of premiums. The same may be said with respect to the size of jury awards and settlements.

Indeed, the Insurance Information Institute, a San Francisco-based organization, recently that California jurors gave smaller product-liability awards on the average in 1984 than they did in 1983. (*National Law Journal*, Feb. 2, 1985, p. 32)

The legal study contracted by the Task Force in 1977 concluded that "the volume and size of damage awards in all probability cannot be considered the direct cause of the alleged [product-liability] insurance problems." I have seen no recent data to suggest otherwise.

The Task Force, in its final report, identified insurance ratemaking procedures as a primary cause of the product-liability insurance "crisis." In 1978 Congress passed the Risk Retention Act in an effort to respond to this finding. Up to now few companies have taken advantage of the Act. It played no part in the decline in premiums in the late 1970s.

If rates are on the rise again, and if the tort system had nothing to do with the prior drop and current increase, it would seem to follow that the solution to the problem does not lie in the federalization of product-liability law.

Senator KASTEN. The last witness on this panel is Mr. Randolph Stayin, representing the American Textile Machinery Association, accompanied by Mr. Durant Hunter.

Randy.

Mr. STAYIN. Thank you, Mr. Chairman. With me today, as well as Andy Hunter—by the way, Hunter is formerly a principal with the former James Hunter Machine Co. which is formerly of North Adams, MA. The company is no longer in business. It is one of those textile machinery manufacturers that went out of business because of product liability.

Also with us on the side here is James C. Scott, the vice president of Marshall & Williams Co. of Greenville, SC, a textile machinery manufacturer, and he is chairman of the ATMA Government Affairs Committee.

I guess I was asked to speak today because we have just completed a study on the international effect of our product liability system as compared to Japan and Europe. Our company did the European and U.S. portion of the study.

Because of the shortness of time, I won't be able to go into what the 300 pages say in total, but I would briefly make a couple of comments and then talk about the competitiveness issue.

We did find that the companies are very much concerned in these five industries about the insurance crisis. It seems to be right at our doorstep again. They are experiencing 500 to 1,000 percent product liability insurance increases over last summer. They are fearful of policy cancellations, of unavailability, and unaffordability which plagued them in the mid-1970's.

We also found that 13.5 percent of the companies dropped product lines because of product liability concerns. We are concerned about the anticompetitive effect of that because when you drop a product line because of U.S. product liability concerns, you just leave the field to foreign competition. 11.5 percent decided against development of a new product because of product liability concerns. We are concerned about what impact that will have on the erosion of the technological edge of U.S. machinery manufacturers.

Going into the actual international competitiveness and comparison issue, I think I might just make some general comments about the systemic differences between Japan, Europe, and the United States because they are far reaching in terms of their impact on product liability exposure.

First of all, our study concentrated on workplace product liability problems because we are dealing with machinery manufacturers, and in those other countries, in Western Europe and in Japan, there is no workplace liability problem. Generally a worker does not sue a manufacturer for workplace injuries. And in speaking to insurers and in speaking to legal professors, and in speaking to attorneys who are trial lawyers, and speaking to manufacturers, no

one could name such a suit, and they all say it never happens. And it doesn't happen because the system creates many disincentives to do such a thing.

First of all, there is no contingent fee system in any of those countries. Contingent fees are illegal. Therefore, the up-front costs of bringing a case will be borne by the plaintiff, and the plaintiff is not likely to bring a case under the system unless he has a tremendously strong case. What makes it even more difficult for the plaintiff is the fact that if he loses his case, he will end up having to pay for the attorney's fees and costs of the defendant. So this is a tremendous difference between the two systems in terms of the cost of bringing this suit.

There are no jury trials in Europe or in Japan. Cases are all determined by judges except in Ireland, and in Ireland the awards for injuries in civil cases generally are four to six times those of England, for example, where the damages are determined by judges and where the standard of living is significantly higher. So without a jury, you are not going to have the sympathetic determination that often juries will give to the injured plaintiff.

Beyond that, you look toward other things, such as the fact that no punitive damages are allowed in any of those countries. Damage awards, litigation, settlement costs are all much lower in those countries.

Pretrial discovery is much more limited. Class actions are not allowed. Technical expertise and specialization of the trial bar is not there with respect to product liability. And with respect to product safety, accident, and defect data, it is not as widely available there as it is here.

In addition to that, there is a predisposition among Europeans and Japanese to not bring a case. They don't like to sue. This is in stark contrast to the high level of litigation consciousness among the American population. In Japan, for example, the injured employee feels he has dishonored himself and would consider it improper to attempt to hold others responsible for his injury. Bringing a lawsuit would cause further loss of face if he were to do such a thing. The French find it very distasteful to get involved in a lawsuit.

In addition to this, I think what also is important is that if he did bring a lawsuit, the worker in all of these systems, would have already received some sort of workers compensation. It is either called workers compensation or Social Security or, as in England, there is an employer liability law and mandatory employer liability insurance required by the State. But in all these cases, the worker receives a payment for injuries in the workplace as is provided for in our workers' compensation system.

However, if you were then to bring a case against a manufacturer of a machine or other workplace product, he would end up being faced with the fact that all he could get would be pain and suffering because the courts believe that he has received payment through Worker's Comp or Social Security for all of his damages, other than pain and suffering. And pain and suffering has a relatively lower value in those countries, limited by statute in many of them.

The net result is that the cost of product liability insurance in Europe is 20 to 100 times less than the cost of product liability insurance in the United States. This goes to the bottom line in determining the cost of the product. This goes to the competitive position of these manufacturers. They have this disadvantage because of their higher product liability costs in this country.

We believe that S. 100 will help reduce those costs and will therefore help reduce the competitive disadvantage that U.S. manufacturers have.

Thank you.

[The statement follows:]

STATEMENT OF RANDOLPH J. STAYIN ON BEHALF OF AMERICAN TEXTILE MACHINERY ASSOCIATION

I am Randolph J. Stayin, a partner in the law firm of Taft, Stettinius & Hollister, and a consultant to the American Textile Machinery Association for its International Study of Product Liability Costs and Systems For Five Domestic Machinery Industries. This study was conducted in cooperation with the Packaging Machinery Manufacturers Institute, the Food Processing Machinery and Supplies Association, the Pulp and Paper Machinery Manufacturers Association, and the Wire Machinery Builders Association. During our research, we conducted confidential interviews with 250 persons, including legal scholars, product liability litigation specialists, insurance experts (consultants, underwriters, brokers, claims management firms, and loss control engineers), manufacturing personnel (presidents and chief executive officers, quality control managers, sales managers, insurance managers and financial managers) and trade association personnel who have been involved in product liability issues. While the study also examined product liability experience in Japan, my firm focussed on product liability in the United States and western European countries. I will discuss briefly some of our findings with respect to the unique product liability problems of the subject industries, and then concentrate on the impact of these problems on international competitiveness.

I. THE WORKPLACE PRODUCT LIABILITY PROBLEM

The workplace product liability problem, the focus of the study, is exacerbated by its interation with state workers compensation laws. Under present law, almost all state workers's compensation statutes (and/or their court interpretation) bar recovery of indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing properly to guard and maintain that product or in making the product unsafe as a result of altering and modifying the product or in failing to instruct and monitor his employees on how to use it. This inequity is further compoundd by the fact that, in most jurisdictions, the employer and/or his worker's compensation insurance carrier obtains a subrogation lien from third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury. The Insurance Services Office [I.S.O.] study reveals that about 56% of workplace product liability bodily injury payments involve cases where the defendant manufacturer would have impleaded the employer based on his fault but for the worker's compensation exclusivity rule. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while employer-users of the products may be completely relieved of financial responsibility despite the fact that they may have been in a better position (or in the only position) to prevent the accident from occurring.

The worker's compensation shield decreases an employer's incentive to acquire safer machinery and generally to provide a safe workplace. Some incentive remains since worker's compensation costs will go down where there are fewer injuries. However, this is offset by the subrogation recovery from the employee's product liability award. Even if the employer is a fault in causing or contributing to the cause of the employer's injury, he may still recover through his subrogation lien all payments made pursuant to the employee's worker's compensation claim. Product related subrogation recoveries amounted to $40.2 million in 1981.

The incentives, therefore, do not reflect the fact that it is generally the employer who is knowledgeable about and dictates the product use/misuse, then transmits the instructions and warnings, controls the environment in which the product is used, and frequently alters the machinery. This system provides an incentive to the

employer to encourage his injured employee to bring a product liability suit against a machinery manufacturer so that even his limited financial exposure can be passed on through subrogation. "Thus, both employees' expectations of a safe workplace and manufacturers' expectations that products will be used safely in the workplace may be frustrated by an employer's lack of incentive to insure that a product is used in a safe manner." [1] The system places the primary incentive for workplace safety on the wrong party and works in opposition to the injury prevention policy of product liability law.

II. PRODUCT LIABILITY INSURANCE—THRESHOLD OF A NEW CRISIS

During the "product liability insurance crisis" (1973 through 1978), the machinery manufacturers which were the subject of this study experienced increases in premiums ranging from 500 to 5,000 percent. Many small- and medium-sized businesses found themselves in a position of not being able to acquire product liability insurance coverage at all or were faced with the unfortunate reality that even it coverage was available, it was unaffordable. Large companies, however, were usually able to maintain product liability insurance coverage or were able to adequately self-insure against the exposure. Small companies did not have the financial or management capability to do this. The potential impact of such a crisis on our society was described as follows:

"It has grave societal implications. The real risk that small or moderate business will liquidate or become bankrupt imposes enormous costs upon society via tax losses, increased welfare payments, and dislocation of employees.

"The resultant anticompetitive conditions caused by liquidating businesses thwart the intent of the antitrust laws. Imposition of an unreasonable form of product liability can stifle the drive of small businesses towards invention and development of new products. Unpredictable financial risks, in the form of ever increasing liability, impede growth and investment." [2]

In the period of 1979 through 1983, the product liability insurance problem stabilized and capacity expanded. This was due in part to a shrinkage in demand, as many companies were taking high deductibles in order to reduce premiums and an increase in supply, as foreign insurers, and reinsurers lured by high product liability premiums added to the capacity in the U.S. insurance market. Furthermore, with interest rates climbing, insurers believed they could make substantial profits on investment of premiums and reserves that would more than offset any losses on product liability policies. With the increase in capacity, insurers became more competitive and product liability rates decreased. Some insurers characterize this period as involving a price war.

Over the last two years, the insurance industry has been cautioning manufacturers that the price war has resulted in losses that have gotten so far out of line with premiums that product liability rates will have to increase. Premiums have not kept pace with the increased losses on product liability coverage. The loss ratio shifted from 15 percent to between 160 and 170 percent in the mid 1970's, when the insurance crisis was at its height. Today, many companies are reporting loss ratios of 150 percent and more. This means that for every $1.00 in premiums received, the insurer is losing $1.50 and that product liability losses are being supported by principle and interest on investment of reserves. It has been reported that the product liability combined loss ratios for most insurance carriers is very poor at this time. The number of underwriters willing to underwrite product liability is shrinking in today's market. Some are only willing to underwrite the large accounts with premiums of over $100,000 per year. As a result of this shrinkage in capacity, the premiums in the entire insurance market are turning upward, especially in the product liability line. Reinsurers are making dramatic increases in rates to insurance companies due to large losses that they have incurred. This, in turn, imposes an additional pressure on primary insurers to increase their rates. There have been general statements that rates will increase by a minimum of 10 to 15 percent (for larger firms with desirable product lines) with most increasing 15 to 50 percent (small firms with good risk) in the 1984/1985 time frame. However, the prospects for machinery manufacturers are much worse. Last summer, members of the Woodworking Machinery Distributors Association [WMDA] received increases of 500 percent to 1,000 percent with only five days notice prior to expiration of their policies.

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[1] Carpenter, *Product Liability—An Analysis Of The Law Concerning Design And Warning Defects In Workplace Products*, 33 S.C.L. Rev. 273, 278 (1981).

[2] Hoenig, *Products Liability Problems and Proposed Reforms*, 651 Ins. L.J. 213, 256 (1977).

Members of the Food Processing Machinery and Supplies Association, the Machinery Dealers National Association, and the Process Equipment Manufacturers Association have experienced up to 500 percent increases; the Packaging Machinery Manufacturers Institute members experienced up to 700 percent increases. Machinery manufacturers with premium levels under $100,000 are expected to be subject to similar increases. Another substantial increase in 1985 is expected when reinsurance treaties expire. Of course, depending upon each company's loss experience and the risk of the particular product involved, the increases could be higher or lower. There is a belief in the insurance industry that we may see an "explosion of premiums". It has also been reported that insurers are requiring or encouraging manufacturers to retain high per occurrence deductibles on product liability insurance.

Companies in the industries studied are fearful of another product liability insurance crisis. Inadequate premium rate levels to cover losses has been described as one of the primary causes of the 1970's crisis. Insurors are describing that same cause as the basis for the sharp rise in current premium costs. The collective response of the insurance industry in the 1970's to this problem was severe rate increases, policy restrictions, and cancellations of product liability coverage. We expect pricing to the intense to support product liability losses. We fear shrinkage of capacity may lead to unavailability of coverage. The 1984 policy increases of 500 to 1,000 percent may be only the tip of the iceberg. Reinsurers are warning of another round of sharp increases in 1985.

III. TRANSACTION COSTS

One reason for the sharp rise in insurance rates is the presence of transaction costs in product liability suits that are extremely high and appear to be out of proportion to the amounts recovered. For every dollar an injured plaintiff received, insurers incurred an average of 42 cents of expenses defending claims.[3] Attorneys' expenses constituted approximately 85 percent of the total of allocated loss adjustment expenses. Similarly, for every dollar an injured plaintiff received, the plaintiff paid an attorney's contingent fee averaging 33 cents. Ths, the plaintiff received about 67 cents out of every dollar of loss recovery. When one adds the average defense cost to the average contingent fee, it apears that for every 67 cents that an injured party received from product liability litigation, the transaction costs expended were 75 cents.[4] A 1983 Rand Corporation study found that for every $59 paid to persons injured by a product, $99 are paid for legal costs of the parties to the product liability suit.[5] These studies appear to demonstrate that our product liability system incurs costs to process claims that are greater than what it pays out in compensation. The testimony of Emmett McCarthy, Vice President for Product Reliability, Dreis & Krump Manufacturing Company, reveals how extreme transaction costs can become in the product liability context:

"During the most recent fiscal year, our small company and its insurers paid out $850,000 for product liability claims. But only 18 percent of that amount went to pay settlements to claimants. About $700.000 went for defense lawyers and other transaction costs.

"I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60 percent of the $700,000 we have expended. I also estimate that about $100,000 of the above would result in savings because of uniformity, thus eliminating the current need for our attorneys to research and brief confliciting laws in 50 states in an effort to persuade courts to change or sustain particular rules of law.

"Second, many transactions costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned—claimants, defendants, lawyers, judges, and manufacturers—know what the rules are, many claims without merit will never be started. Over the years we have lost only four verdicts out of the many claims that we have defended.

"We average over $30,000 in defense costs on claims that proceed through trial. But we average about $5,000 in investigating and defending each claim we receive, regardless of the eventual dispositon. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance that they would be required to prove fault in design and warning defect cases—and if there were a rea-

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[3] *Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, 11 (1977).

[4] *See* S. Rep. No. 476, 98th Cong., 2d Sess. 7 (1984).

[5] *Id., see* Kakalik, Ebener, Felsteiner and Shanley, Costs of Asbestors Litigation (1983).

sonable period of repose for average products—most of these claims would never be filed." [6]

IV. OTHER IMPACTS ON DOMESTIC INDUSTRIES STUDIED

The product liability system in the United States has had a major impact on domestic manufacturers of industrial machinery. In addition to the high cost of product liability insurance, the great expense incurred in defending lawsuits and the substantial investment in risk prevention and minimization, product liability has become so intimidating to the industries studied that 13.5 percent of the companies had dropped product lines and 11.5 percent had decided against development of a particular new product due to these concerns. These domestic manufacturers are removing highly vulnerable, but socially and economically necessary industrial products from the U.S. market, leaving the arena to their foreign competitors to fill the void. This reduction in competition may lead to higher prices for the foreign machines and potential disruption in production of, and the competitiveness of, the U.S. purchaser of the foreign machine who may be left subject to the whims of foreign suppliers. The reluctance to develop and introduce new products may lead to further erosion of the United States' competitive edge in technology.

In the textile machinery industry, product liability has taken its toll, forcing companies to drop lines or to go out of business. After 100 years of manufacturing rotary textile machines, Proctor & Schwarz, Inc. dropped its entire line of rotary textile machinery due to economic factors, including mounting costs (direct and indirect) of product liability. "Since that time, they continued to be faced with the ever-increasing costs of defending lawsuits, some of which arise out of accidents involving machines that are 70 years old and others involving cases where the accident occurred on machines that were not manufacturered by Proctor."[7] The theory of risk spreading as a philosophic basis for strict liability does not work for companies like Proctor because the cost of product liability cannot be passed on to consumers of the product when the product is no longer being manufactured by the company. The James Hunter Machine Company, Inc. ended its 136 years of manufacturing textile machinery by filing Chapter 11 bankruptcy, "not so much because business conditions are poor, but because of a little understood, yet all too familiar concern of American manufacturers—product liability." [8] Davis and Furber Machine Company began manufacturing textile machinery in the U.S. in 1830 and went out of business in 1982. The annual cost of product liability made manufacturing new textile machinery impossible. . . .

At one point Davis and Furber was one of the largest textile machinery manufacturers in the world. It no longer exists.[9] U.S. textile manufacturers still need the rotary textile machine that these three former competitors had supplied in order to continue to manufacture U.S. made textiles. The lion's share of the U.S. market for three machines is now controlled by foreign competitors.

V. COMPETITIVE IMPACT OF U.S. PRODUCT LIABILITY SYSTEM ON INTERNATIONAL TRADE

During the past decade, capital goods manufacturers have complained repeatedly about the advantage enjoyed by their foreign competitors as a result of the U.S. product liability system. Our study concluded that the U.S. product liability system has the effect of providing foreign capital machinery manufacturers with a competitive edge over their domestic counterparts. Differences between U.S. product liability system and the product liability systems of the Western Eurpoean countries and Japan result in higher product liability costs to U.S. manufacturers that are necessarily included as part of the overhead in determining the unit price of U.S. machinery.

Although a product liability action may be brought in Europe and Japan against a manufacturer of workplace machinery, such actions are virtually nonexistent. This is primarily due to an approach to workplace product liability in these countries that is quite different from that in the United States. A worker injured in the countries studied is compensated by workers' compensation, a social security system or the employee's company. An injured employee typically believes that he has been fully compensated as a result of receiving his social security or workers' compensa-

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[6] *Product Liability Reform: Hearings on S. 2631 Before The Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation*, Serial No. 27-109, 97th Cong., 2d Sess. 102 (1982).

[7] See Appendix I.

[8] *Id.*

[9] *Id.*

tion payments and thus does not seriously consider pursuing the manufacturer of the machine upon which he was injured. Moreover, those countries rely primarily on the employer for workplace safety.

If the foreign employee that was injured did pursue the available product liability remedies, he could only hope for compensation for pain and suffering since foreign courts consider workers' compensation or social security payments as full compensation for all of his other damages. Although the concept of pain and suffering and the flexibility accorded U.S. juries in this respect contributes to high product liability awards in the U.S., pain and suffering has gained much more limited recognition in the foreign countries studied. Awards for pain and suffering in some European countries are specifically limited by statute. Moreover, the Europeans seem to place a lower value on intangible, general damages like pain and suffering.

The use of juries in civil trials is virtually unknown in Europe and Japan. Among Western European countries, the jury system operates in civil cases only in Ireland, where it has been found that, on average, damages awarded are four to six times higher than in England (where damages are awarded by judges). This is despite the fact that England has a considerably higher standard of living.

There are further disincentives in the European and Japanese systems that discourage injured employees from pursuing a product liability action against a manufacturer. Unlike in the United States, contingent fees for lawyers are illegal. Under the United States contingent fee system, plaintiffs can avoid the upfront costs of financing litigation. In the countries studied, the plaintiff will not only be required to pay for his own attorney's fees, but if he loses his product liability action, he may have to pay the legal fees and court costs of the defendant. Technical expertise and specialization in product liability among American plaintiffs' lawyers is not developed in Europe. Thus, it is much more difficult for European and Japanese lawyers to maintain successful product liability actions, especially in cases involving the very technical elements of design defect. Damage awards, litigation and settlement costs are much higher in the United States. These account for the substantial difference in premiums between U.S. and European coverage. Further, punitive damages are not available in these foreign jurisdictions and, therefore, the plaintiff does not have the windfall potentially available to the United States litigant. Pre-trial discovery in the investigated countries is much more limited than in the United States and class action suits are not allowed. Product safety, accident, and defect data that is widely available in the United States, is much more difficult to obtain in such countries.

All of these factors create a substantial disincentive for an injured worker to bring a product liability action against a manufacturer of a workplace product. In addition, there is also the overriding predisposition among Europeans and Japanese against litigation, a phenomenon in stark contrast to the high level of litigation consciousness among the American population. In Japan, the injured employee feels he has dishonored himself and would consider it improper to attempt to hold others responsible for his injury. Bringing a lawsuit would cause further "loss of face".

Finally, if the injured employee of a foreign company were to pursue a product liability action, he is more likely to have to proceed on a negligence theory that is more difficult to sustain than the strict liability theories applicable in the United States. Product liability law in some countries, such as France and Belgium, however, is nearing the United States concept. It is important to note that, in these countries, product liability law has developed as a result of consumer product injuries. In any event, due to systemic disincentives and reluctance to litigate, the product liability remedies for workplace injuries exist in theory, but are not pursued. For all of these reasons, foreign competitors have product liability insurance costs 20 to 100 times lower than those of their U.S. competitors in their respective home markets and do not have the burden of all of the other product liability related costs incurred by U.S. manufacturers.

In addition to the high cost of product liability insurance, U.S. manufacturers also incur costs related to product liability claims, such as: deductible sums under the insurance policy; awards above the policy limits; time and costs of company personnel spent in accident investigations, document assembly and production, interrogatory responses, court testimony, etc.; and product recall, field retrofit or replacement expense. During our visits to manufacturing plants in the U.S., we were impressed by the amount of effort and degree of care expended by manufacturers in order to assure the safety of their product. In addition to those costs, however, they incur further continuous costs for preventative measures to reduce product liability risk. Questionnaire responses received from companies in the subject industries reveal that these risk prevention costs, exclusive of product liability insurance, range from $5,000 to $80,000 per year. Other industries have experienced similar

costs. One machine tool manufacturer reported that his product liability costs per machine increased from $200 per machine in 1970 to $11,000 per machine in 1982. In 1981, its product liability insurance costs were 3.1 percent of sales.[10]

The Sporting Goods Manufacturers Association has indicated that its product liability costs in 1982 amounted to 4.2 percent of sales compared to 0.5 percent of sales for its Japanese competitors.[11]

A spokesman for the National Machine Tool Builders Association, whose members are experiencing import penetration of the United States market in excess of 40 percent, made the following observation:

"Part of the foreign machine tool manufacturer's cost is product liability insurance. As with any other cost, it is factored into the price of their respective products. Because the United States is only a partial market for them, their product liability costs are substantially less than those of domestic machine tool manufacturers. We still sell the bulk of our products here and must face exposure to product liability with respect to a substantial number of our products.

"Perhaps more importantly, our product liability insurance costs are affected by our older products. Under product liability law today in the majority of states, we are potentially responsible literally 'for ever' for products. . . . While we usually win these [overage product liability] suits, they result in high legal and transaction cost. . . . Foreign machine tool manufacturers, on the other hand, do not have these older products in this country. Therefore their product liability insurance costs often are substantially less than ours. With total instability in our law with regard to older products, we, in effect, have a major stumbling cost block with foreign competition . . ." [12]

The majority of total product sales by the manufacturers in the subject industries are made to customers located within the United States. This is because of their dominance over the past 100 years of the U.S. market, the size of the U.S. market, and difficulties inherent in exporting. Generally speaking, U.S. manufacturers dominated the domestic capital goods market until the last ten years. They then began to experience a severe erosion in market share brought on by foreign competitors that had begun to catch up for a number of reasons, including technological advances and price competition.

While foreign manufacturers have achieved substantial penetration of the U.S. market in recent years, the volume of their products in the U.S. market is far less than in their own domestic markets and the world market generally. Therefore, the foreign manufacturers do not have the high level of exposure, as a percentage of sales, to U.S. product liability that their U.S. competitors must bear.

Furthermore, U.S. manufacturers are plagued by the long tail of potential liability that accompanies machines that were sold and have been operating in the United States for 50 years or more. Primary concerns expressed by manufacturers in the studied industries related to product liability experiences with these older products and to the fear of unending future liability for these products. These older products do not benefit from more recently developed safety devices and, in fact, were built at a time when the manufacturers had never even heard of the concept of product liability or the accompanying emphasis on "human factors engineering." These machines have often passed through many different users and have been modified or altered by the different owners to suit their purposes. These problems are compounded by the difficulty in locating these older machines and the resistance of their owners to pay for, or accept, costly safety improvements.

In contrast, there are very few older products of foreign origin in the United States. Their newer, foreign products have been engineered with modern safety features and, therefore, are much less likely to cause an injury. The newer product is more likely to still be in use by the original purchaser and, therefore, easier to locate for purposes of recommending safety improvements. As a result of these factors, the foreign manufacturer faces fewer lawsuits, lower product liability overhead, and lower product liability insurance costs for those products sold in the United States.

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[10] Testimony of Herbert W. Goetz, Product Safety Manager of Cincinnati, Inc. before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation (March 12, 1982).

[11] *See* letter from Howard J. Brunz, President, Sporting Goods Manufacturers Association, to the President of the United States (April 23, 1982).

[12] Letter from James H. Mack, Public Affairs Director, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 10, 1982).

The United States manufacturer incurs the higher cost of U.S. product liability for a higher percentage of its products, thus increasing the total unit cost for U.S. machines as compared to foreign machines. The unending exposure for older machinery further increases this overhead burden as compared to the foreign manufacturers. Insurers establish product liability rates on an individual company and product basis, looking closely at loss history and the breadth of potential exposure. The number of products that are exposed to product liability in the United States and prospective liability for overage products will result in a higher product liability insurance rate than that which would be charged to foreign manufacturers for the products they are selling in the United States. While foreign manufacturers will have one product liability insurance rate for the United States (and possibly Canada) and another for the rest of the world, even the coverage for the U.S. sales will cost less in comparison to that of their U.S. competitors. The rate will be lower due to the lower risk of their newer machines and the absence of the long tail of liability. The overall premium will be less due to the lower volume of sales in the United States market. Finally, the U.S. rate can be averaged in with the lower overhead created by the "other than U.S." rate, thus allowing the foreign manufacturer even more flexibility in pricing its units sold in the U.S.

Many of the U.S. companies interviewed did not purchase separate policies for United States coverage and for foreign coverage. These companies did not experience a reduction in premium to reflect sales to the export market. Some companies had purchased separate coverage for exports at a lower rate than for the the U.S. coverage. However, even those companies that separately insure for foreign coverage incur an insurance cost element greater than that of their foreign competitors' insurance costs abroad. This is due to the fact that even where an injury occurred abroad, there is always a possibility of being sued in the United States. [13]

Product liability insurance rates set for foreign machines coming into the United States also reflect the difficulty of bringing suit and enforcing a judgment against the foreign manufacturer. During an interview, a U.S. insurer stated that, unless the foreign manufacturer has an American operation, his experience indicates that pursuing the foreign manufacturer in a product liability suit would be fruitless. This assumption is taken into account in the underwriting considerations about a U.S. manufacturer who uses imported components. Unless the foreign manufacturer has an office, plant, agent, or certain other minimum contacts with in the jurisdiction of the U.S. court involved, it may be difficult to assert jurisdiction over the foreign manufacturer. Service of process and discovery are complicated by international conventions requiring translation of the pleadings into the foreign language and compliance with the procedural rules and public policy of the foreign jurisdiction. Unless the foreign manufacturer has assets in the United States that can be identified by the plaintiff, a successful plaintiff will then be faced with the difficulty of enforcing his judgment in the foreign country. There are no international conventions which provide for this procedure. At best it is difficult, and it is often impossible to execute that judgment against the assets of the foreign manufacturer in its own country. Britain has resisted efforts of the United States to negotiate an enforcement of judgments treaty in order to avoid what it considers to be excessive product liability awards. Thus the successful plaintiff will then have only the hope that he will somehow be able to identify assets of the defendent that may enter the U.S. in the future, a difficult prospect at best.

With these handicaps and the great expense in time and money that a plaintiff's attorney would have to incur in order to proceed against such a foreign manufacturer, it is highly unlikely that a frivolous suit or a case with questionable damages would be initiated. Therefore, the foreign manufacturers will only face product liability actions where the case for liability is strong and the potential damages are substantial. Our interviews revealed that a great number of the product liability suits brought against U.S. manufacturers are considered by them to be tenuous at best and many are clearly frivolous. Nevertheless, these actions still involve a great deal of expense for the manufacturer to extricate himself from the proceeding. For example, a number of manufacturers interviewed described suits against them for injuries caused by machines that they had not manufactured. One company explained that it cost $13,000 in one case and $18,000 in another to extricate itself by way of summary judgment from such a suit. If U.S. plaintiffs faced the same procedural difficulties in pursuing domestic manufacturers that are involved in cases against foreign manufacturers, there would be a substantial reduction of product li-

[13] "Product Liability and International Trade and Politics", a paper presented by Frank A. Orbin, III, International Counsel, Armstrong World Industries, to a product liability seminar sponsored by the National Legal Center for the Public Interest 3-5 (April 21, 1982).

ability brought against them and, therefore, reduced insurance costs and other overhead.

On the other hand, foreign manufacturers and insurers are generally appalled by the increasing impact on their operations of the American product liability explosion and are even offended by liability actions against them in the United States which they view as the imposition of our socioeconomic values upon them. They are further confused by the vagueness of our product liability laws and their variance in the 50 different states. Many are especially appalled by punitive damages, which they consider penal in nature and only to be imposed in the form of fines and other sanctions, not as rewards to private litigants. They believe that compensation should vary not according to degree of fault but according to degree of injury and loss.

Some Europeans suggested that the U.S. product liability system amounts to a non-tariff trade barrier. They asserted that the high cost of product liability insurance and the threat of outrageous jury awards discourage some European competitors from entering the United States market. With the product liability insurance capacity in Europe beginning to shrink, it is becoming more difficult for foreign firms (especially in France) to acquire coverage for U.S. exports. Thus, some firms have decided to proceed with sales in the United States without product liability insurance on the theory of "catch me if you can." Indeed, it has been reported that 60 to 70 percent of French companies do not insure for product liability. This, of course, gives them an additional competitive advantage. It is particularly difficult for a small company with a small potential sales volume to justify the cost necessary to insure its sales against product liability in the U.S. market. In fact, the U.S. product liability system is not a trade barrier because U.S. firms, which are competing against the foreign manufacturers, are paying even higher product liability costs.

The U.S. product liability system has had effects on international trade beyond competition in the sales of machinery. Some foreign investors have decided not to acquire U.S. companies because of the long tail of product liability exposure that comes with successor liability in the United States. Some foreign manufacturers that considered opening a plant in the United States have decided against it. An example was cited of one company that had actually closed several plants in the United States in order to escape further exposure to U.S. product liability laws. This, of course, has a negative impact on our economy because of a loss of jobs from the closing of the plants and the potential jobs that could have been created by the opening of other plants. Such decisions are being made on the basis of actual knowledge of exposure or due to the inability to predict or have any certainty as to the potential exposure.

In sum, it appears that foreign manufacturers of capital machinery often enjoy a competitive advantage over the subject U.S. industries' manufacturers due to the difference in product liability costs. The full extent of this advantage is difficult to calculate and varies with particular circumstances of each competitor.

VI. THE NEED FOR PASSAGE OF S. 100, THE PRODUCT LIABILITY ACT

While this study focused on identification of approaches to reducing insurance costs and developing risk prevention measures in order to ameliorate the product liability problem, it cannot be ignored that the single most effective measure for reducing product liability costs would be the enactment of S. 100, "The Product Liability Act". The Federal Interagency Task Force on Product Liability concluded that a major cause of the product liability problem is the uncertainty in the tort litigation system.[14] This conclusion was confirmed by our interviews with manufacturers and insurers in Europe and the U.S. The patchwork nature of U.S. product liability law and the attendant unpredictability of responsibility has resulted in higher than necessary insurance costs. By replacing the varying product liability legal standards in the 50 different states and the District of Columbia, S. 100 will establish national standards to be applied uniformly by the courts throughout the country.

It is very difficult for manufacturer and insurers to plan for the amount of insurance needed or to predict the theory of recovery likely to be used since products liability laws differ significantly from state to state. These laws determine the probability and the size of the losses involved. Also of significance are the various statutes of limitations among the states, the various defenses available, and the differing forms of damages. Insurers are more hesitant to become involved in products

[14] U.S. Dept. of Commerce, Interagency Task Force on Product Liability, Final Report at I-20, I-26 (May 1977).

liability risks because of these factors and also because of a trend toward greater liability and increased compensation.

Manufacturers of durable products such as machines present particular problems for their insurers who must set current premiums for goods that may be outdated yet still in use. Liability for machines that often cannot even be located exacerbates the difficulties involved in estimating future losses. These indefinite liabilities gave raise to severe premium increases for capital goods manufacturers. "In 1976, these uncertainties contributed to liability premium increases of over one thousand percent. . . . To the extent there is a crisis in products liability insurance, it has been caused more by increasing uncertainty about future suits and settlements than by known increases in claims costs."[15] Our research shows that these uncertainties contributed to increased premiums in the 1970's among the subject industries by 500 percent to 5,000 percent. We believe these uncertainties helped cause the sharp increases in premiums of 500 percent to 1,000 percent for these industries in 1984.

S. 100 generally adopts the majority view of strict liability in manufacturing and express warranty cases and a fault-based standard in design defect and failure to warn cases. Furthermore, a product would not be considered unreasonably dangerous in design if a means to eliminate the danger was not within the practical technological feasibility at the time of manufacture and the usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm. A comparative negligence approach is adopted with respect to apportioning responsibility among those who caused the harm. The plaintiff's own conduct, contributory negligence, or assumption of risk reduces compensatory damages awarded to the plaintiff by an amount proportionate to the claimant's responsibility. Manufacturers are responsible for their own conduct. Evidence of misuse or alteration of the product is relevant in apportioning responsibility. This is in accordance with the purpose of the Act which is to place incentives for prevention on those best able to implement that goal.

The Act attempts to reduce the inequity that arises out of the interaction between the workers' compensation and product liability systems in the United States. While the employer retains the workers' compensation shield to any further liability to the employee, subrogation is eliminated and the amount of workers' compensation the plaintiff will receive is deducted from any amount that a court determines the manufacturer must pay as his proportionate responsibility for the injury. This reduction does not affect the amount the plaintiff currently receives, but rather takes the place of the employer's subrogation lien which currently is being deducted from the recovery of the plaintiff. The Alliance of American Insurer's 1979 survey found that workers' compensation subrogation was involved in 68.5 percent of job-related accidents. This provision will reduce transaction costs attendant to subrogation.

In the case of capital goods, S. 100 provides a statute of repose of 25 years after delivery to the first buyer or lessee. The only exceptions are: in the case of manufacturer's intentional misrepresentations or fraudulent concealment of information about the product; where the plaintiff's harm was caused by the cumulative effect of prolonged exposure to the product; or the harm did not manifest itself until after the time limitation. While a ten year statute of repose would be a more realistic approach to the useful safe life of a machine, the 25 year limit will be helpful with respect to long tail liability created by over-aged machines. Our study reveals that of the 55 companies responding to our questionnaire, 11.8 percent have been producing machinery for over 100 years and that the companies responding had been producing machinery for the average of 47 years.

Evidence of post-manufacture corrective measures taken by the manufacturer after an injury has occurred would not be admissible in court to prove liability. Such evidence would be admissible only to impeach denial of feasibility of remedial measures. This would overrule the minority position allowing such evidence to be presented to a jury and would preserve the incentive for manufacturers to improve their products and warn users of potential hazards in products already in existance in the field. Interviews with company personnel reveal that a fear of such evidence reaching a jury has caused a reluctance on the part of some manufacturers to take post-manufacture corrective measures.

A two year statute of limitations is provided for that does not begin to run until the plaintiff discovers, or should have discovered, both his harm and its cause.

By specifying criteria for determining responsibility and limitations on responsibility, S. 100 would reduce uncertainty and ambiguity in the product liability field.

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[15] Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 Baylor L. Rev. 137, 142 (1980).

The predictability of manufacturer's responsibility will result in lower produce liability insurance premiums. Defense costs will be reduced because there will be no need to use local counsel to research the law relevant to the case in the particular jurisdication involved and any conflict of laws issues that may arise as a result of the interstate nature of product liability cases. Our research indicates this could result in a upfront savings of $3,000 to $5,000. Predictability will also assist in dealing with the problem of successor liability and the continuation of businesses that are failing as a result of product liability burdens. The elimination of subrogation will increase the incentive of employers to maintain a safe workplace. This would bring our product liability system closer to the European approach to the workplace problem where an incentive and responsibility is placed upon the party best able to create safety and prevent injuries in the workplace. The transaction costs involved in the pursuit of subrogation would also be eliminated. A reduction in transaction costs would also result because meritorious suits will be settled more quickly due to the certainty of legal standards applicable to the case. While the plaintiff's rights are maintained (and even enhanced by the statute of limitations and comparative fault approach), manufacturers will benefit through lower insurance and transaction costs as well as the ability to predict their responsibility and act accordingly in producing a safer product. Consumers and buyers of products will benefit as lower product liability costs will be passed on in the form of lower prices for products. For all of these reasons, we urge your support for S. 100 and ask that it be established as a priority for passage as soon as possible.

Senator KASTEN. I want to just make sure I understood. Twenty to 100 times less for insurance premiums for the same product? Do you have examples in which you could have a particular machine or a particular machinery company, where you have got one in the United States and one in Germany or Japan, where you can compare directly?

Mr. STAYIN. The data that we received was from insurers in Europe and in the United States, but there are only a couple of examples where we can get a European company to tell us what his details are. We do have more information on U.S. machines.

For example, one company in Switzerland, while there is no U.S. manufacturer of that machine, the U.S. distributor of this Swiss machine for U.S. coverage pays, I think it is--let me get the exact data—43 times more than what the Swiss manufacturer pays for his insurance.

Senator KASTEN. The distributor pays 43 times more than the manufacturer, the manufacturers in Europe, the distributors here?

Mr. STAYIN. Right. And the seller of the same used Swiss machines, the distributor of used machines of that foreign manufacturer, pays 36 times more for his product liability insurance in the United States for selling those machines, and he specializes in those machines.

So that is an example, I think, of what you are talking about.

Senator KASTEN. Mr. Hunter, it is my understanding that you are no longer in business because of product liability problems. If that is the case, if you could just maybe in 2 minutes, just summarize the particular problems that you found yourself in.

Mr. HUNTER. Certainly.

A few years ago, I left New York City to join my family's company, which is the James Hunter Machine Co. in North Adams, MA. It is a small town. The family was one of the largest employers in the town, and the firm was 136 years old. And my father convinced me to come back to be the sixth generation to run the family business.

During that time span from 1981 to 1983, there were a number of problems that we faced, the recession, the strong dollar, but noth-

ing was more severe and difficult for us to deal with than product liability.

Senator KASTEN. What did you make?

Mr. HUNTER. We made textile machinery, the kind of garnets, cards, nonwoven needling machines. This equipment is extremely capital-intense, a capital goods manufacturer. Some of the machines we made were as wide as this room, weighed 40 tons.

The difficulty that we faced in product liability, being an old company, 136 years old, we had a lot of machinery out in the marketplace. And at the time we declared bankruptcy, we had 20 suits pending, actual suits. And the difficulty that we faced—and this is a very personal statement—the inability to assess the risk; you know, how many more machines out there were there that we could possibly be sued on?

And the difficulties—we could not get a handle on our risk. As a businessman, that is a very fundamental problem. Another problem we had, as I alluded to earlier, was our old equipment, in that we had been sued and lost on a number of cases for machinery in excess of 50 years old. Some of these machines had our name on it, but we had no—we could find no record of that machine, other than in the cast iron was the stamp "Hunter." It made its way back to us.

Speaking quickly, the crisis in product liability caused us to shelve our R&D program. This played very nicely into the hands of our foreign competition. At the present time there is no American manufacturer who makes the equipment that we were making. This now requires American manufacturers who want to craft with pride—they have to purchase a foreign machine.

One other problem we had as a small manufacturer: This is a very tiny company, $10 to $12 million in sales. With suits in 20 different States, trying to keep track of the 20 different lawyers was an unbelievable problem.

Another problem that you might be interested to know, since we have declared the bankruptcy and it is going through the court system, that the contigency fee system was a real problem for us, and we saw it as promoting conflict. It inflated the damages.

And an interesting thing has happened. After we filed bankruptcy, we have only received two suits in two years. And prior to that, we were averaging five or six suits a year. Another interesting thing happened, that in the bankruptcy proceeding, we have been able to settle the suits, and we have settled our suits in the sum of about $150,000. And that was peanuts compared to the lawyers' fees we were paying these 20 lawyers around the country.

And I think it is kind of ironic that once the deep pocket is gone, suddenly there are not a lot of sheriffs at my doorstep handing me suits.

Insurance was a problem for us. We had a very difficult time getting insurance. We could buy $500,000 worth of insurance for $185,000, with a $25,000 deductible. That is not insurance. We tried to merge our company but we were unable to do so because of our product liability problem.

Finally, after the 2 years, I went to my father and said, "Dad, thanks for the business."

But, you know, I am not going to spend the rest of my life fighting with lawyers around the country. It is just ridiculous.

And so who benefited by the fact that Hunter Machine, which employed 250 people, was out of business? The customer, I don't think, benefited. I don't think our employees benefited. And half of them were union members. I don't think the town benefited by the fact that many people had to move away, including myself. I know the family hasn't moved away.

So where are we today? My father, ironically, is in charge of the Northern Berkshire Economic Development Council. He is trying to bring businesses into the area. So, on the one hand, we are forced out; and on the other, he is now trying to bring businesses to the area.

I have gone. I have moved to the Boston area, and I am a consultant. Now I am working—I have a few clients, foreign textile manufacturers, that I am working to help them bring their products into the United States, which is contrary to what I was working on in my own company.

And finally, the one last thing is, we gave a dinner about a year ago, wrapping up. And one of the gentlemen that worked for our company came up to me, crying, and he said, "After a whole year, I still have not found a job."

And I don't think that that is a very beneficial state for our country to allow such things to happen.

Senator KASTEN. I agree with you.

Senator Hollings.

Senator HOLLINGS. Mr. Chairman, I just wish we had more time. If the gentleman of the Hunter Machinery Co. can't understand, after going into bankruptcy, why he wasn't sued further, I doubt if he could understand the manufacture of the machinery itself.

Let me just say this, Mr. Stayin. You are working down the line for machinery manufacturers. And you go through this in your statement step by step, and then you get to what seems to have impressed the chairman, that product liability insurance costs 20 to a hundred times more in the United States than overseas.

And leading up to that conclusion, you say in these other countries, for example, awards for pain and suffering are limited. Do you suggest we do that in this business?

Mr. STAYIN. No, sir. I am not proposing that we change to their system.

Senator HOLLINGS. You say that contingent fees are illegal. Do you think we ought to make contingent fees illegal?

Mr. STAYIN. No. But that explains why it is less expensive.

Senator HOLLINGS. Well, you say that the plaintiffs are required to pay their attorneys' fees, so you must have a fiscally responsible plaintiff who is injured, if they are going to get to court. Is that right?

Mr. STAYIN. No. I think if they have a case that is likely to be won, they will be willing to invest in it. Otherwise, they are not going to go with the case.

Senator HOLLINGS. They are not going to go with the case? It has nothing to do with the financial standing of the individual himself. A poor person may run around the Congress saying there are 30 million families, or 30 million Americans, I should say, that are in

poverty. Now, they would not have money for attorneys' fees. They don't have money for meals and housing.

Mr. STAYIN. There is legal aid.

Senator HOLLINGS. So that is 30 million that would be disallowed from any kind of——

Mr. STAYIN. There is legal aid for those who cannot afford to bring a suit.

Senator HOLLINGS. You think so?

Mr. STAYIN. In Europe.

Senator HOLLINGS. When you say legal services, this administration is trying to abolish it, and Senator Kasten and I are trying to keep it, but under even legal services, they are not allowed to bring these product liability suits.

Mr. STAYIN. No. Senator, what I listed were the differences between this system and that system. I am not suggesting—that is why the difference in cost.

Senator HOLLINGS. Well, go down your conclusions that impressed the chairman so much. Punitive damages are not available. Do you think we ought to do away with punitive damages?

Mr. STAYIN. I do, but I am willing to go along with this bill as it is. I think punitive damages are penal in nature, and if you are going to penalize somebody, then let us do it in the criminal system beyond a reasonable doubt, rather than through the civil system.

And that, of course, is the European and Japanese approach.

Senator HOLLINGS. So you would propose a criminal provision in here, beyond a reasonable doubt, and send them off to prison, rather than punitive damages.

Mr. STAYIN. I think if we are going to have a penal measure dealing with product liability, which is what punitive damages are, then it ought to be dealt with as a criminal matter rather than dealt with as something that adds on above and beyond the compensatory damages that are already reviewed by the plaintiff.

The plaintiff is already made whole by his compensation. Now, if we are then going to go to these companies and say we are going to impose punitive damages, then it seems to me that let's talk about beyond a reasonable doubt, and let's talk about passing this as legislation on a criminal basis rather than making it part of the civil system.

Senator HOLLINGS. Well, are you suggesting that with a lot of Mr. Hunter's cases where plaintiffs claimed punitive damages, they should have gone down to the U.S. attorney or the Solicitor and drawn up a warrant and arrested him, let him put up a bond, and charged him with a crime as well as the damages that they were asking for in a particular case. Is that what you contend?

Mr. STAYIN. I doubt very much that Mr. Hunter would have been approached in any of those cases.

Senator HOLLINGS. Well, they sued for punitive damages in those cases. But you say let's get rid of the punitive damages, go the penal route by having it a crime, and swear out a warrant and arrest the poor fellow.

Mr. STAYIN. Actually, that is what I would prefer personally, but I am endorsing S. 100 and accept that position in its totality.

Senator HOLLINGS. Well now, pretrial discovery, we ought to do away with that, too. It is limited and——

Mr. STAYIN. No, sir. I do not advocate changing our system to the system in Europe. What I advocate is S. 100, which I believe will reduce the cost in product liability and will help, therefore, ameliorate the differential between the two. It is not going to totally change it.

Senator HOLLINGS. When you say product safety, accident defect data is widely available in the United States, but is difficult to obtain in these other countries; that we ought to make it more difficult to obtain? Is that your contention?

Mr. STAYIN. No, sir; not at all. As I said, I did not advocate any of these changes between the two systems. I advocate S. 100.

Senator HOLLINGS. Well, you say there are 20 to 100 times lower premiums in all these other countries. You said they don't have a jury system. You think we ought to do away with juries and civil trials?

Mr. STAYIN. No, sir.

Senator HOLLINGS. And a feeling of dishonor about litigation also is one of the reasons here for the 20 to 100 times lower insurance premiums and costs for the liability insurance for product liability.

Do you think that someone who has been injured as a result of a defective machine or tool, that they should feel dishonored if they bring a claim and want to be compensated?

Mr. STAYIN. No, sir. What I do believe, sir, is that the reality of today is that their system is so different than ours, both in Japan and Europe, that the competitors of these machinery manufacturers had a competitive advantage. That is the reality. And I think that we could help soften the disadvantage that our manufacturers have by passage of S. 100.

I am not suggesting we change our entire system because I do not think it is possible at all, and I wouldn't go along with any of it.

Senator HOLLINGS. Let me just state categorically that the textile industry itself says that the solution to their problem would be to make the American people more aware of American-made products and be loyal to their purchase.

In other words, we have crafted with pride ties and pins and various other things of that kind. And that when I go in the plant, the majority of the machinery is foreign machinery. And the majority of the fiber now, Du Pont has cut back, a large cut back in everything, and I am jumping on them.

And we just recently had a textile dinner with the top executives there, and they just said, oh, don't tell us about the machinery. The American manufacturers didn't keep up, and we were just forced to go over and buy. That's why; there are no good American manufacturers. We were forced to get the better machinery overseas.

Now, that is exactly what they have been telling me, every one of them. And I have been saying let's follow their own premise of crafted with pride. Let's buy some American machinery.

Mr. STAYIN. Well, one of the problems they do face is the companies like Procter & Schwartz and James Hunter and Davis & Furber have stopped making some of these textile machines, and therefore, they can't buy some of the machines that they need from

U.S. manufacturers because they are only being made by foreign competitors.

These companies say that the reason they stopped manufacturing their products or went out of business is because product liability drove them out.

Now, another point with respect to the technological differential, I am not capable of commenting on that. I do know that for some companies—and Andy was saying this before—that the cost of product liability was so great that they had to give up R&D completely. I don't know how this affects the R&D funds that other textile machinery manfacturers have. The costs of product liability can be so great that they don't have funds to invest in R&D. And this is just another way that product liability comes around back and undercuts their ability to compete.

Senator HOLLINGS. Just indulge me, Mr. Chairman, just on one question to Mr. Larsen here.

Mr. Larsen, you perhaps have given the best testimony with respect to insurance costs and you detail in enumerated paragraphs, you say the reason for the current dilemma for higher insurance costs is the deregulation of commercial insurance, the decline in actual short-term interest rates, the strength of the dollar, exhaustion of deferred tax credits, amendments to the Internal Revenue Code.

What does that have to do with State court liability and State court law causing a crisis? You, yourself, list all of these other things that S. 100 had nothing to do with.

Mr. LARSEN. I think it has a great deal to do with it, Senator. What I was trying to explain was that those factors, experienced during the period following the previous product liability crisis of the mid-1970s were the very factors that masked the realities that were confronting American industries. Insurance companies were able to operate at an operating loss, meaning a combined claim and expense ratios of over 100 percent, because interest rates were very high; or, they were able to attract foreign reinsurance capacity which has now been totally squeezed out of the system.

So we find ourselves in the second and third quarters, and certainly the fourth quarter of 1984, and now totally in the first quarter of 1985, where insurance companies are taking a very, very hard look first, at their diminished ability to assume risk. This involves a ratio of capital and surplus to total premium writings.

Senator HOLLINGS. That would apply to all insurance, wouldn't it, on buildings, houses, commercial properties?

Mr. LARSEN. Absolutely. But what I am saying is that insurers are looking most intensely at those areas of insurance where the actuaries are least able to provide long-range predictablity, the situation is such that I assure you that if you and I were to form the Rose Garden Insurance Co., we would have to build a moat around our office right now if we held ourselves out as a source of product liability insurance, because uninsured companies would be beating a path to our doors.

Insurance companies are saying let's allocate our resources, our ability to assume risks, to the more predictable lines, the ones that have a shorter tail to the claim period. The property coverages, automobile coverages, and other personal lines items where they

have a much higher degree of predictability and where tort law is not as convulsive in its change as it has been in product liablility.

Senator HOLLINGS. Professor Page, would you comment, please?

Mr. PAGE. Well, I can only reiterate what I said before which is that I did not see any dramatic changes in the tort law over this longer period of time that I looked at. And yet, the rates went up, and then they went down, and then they went up again, which leads me to believe that there are other factors which produce those results.

And I am very skeptical as to whether S. 100 will produce any such salutary result on insurance costs if it is enacted, because there are so many extraneous factors which impact on these rates.

Mr. MACK. Mr. Chairman, if I can, I think that what Mr. Page and Mr. Larsen have both said, I think prove a point. What Professor Page and Mr. Larsen have done is to enumerate some of the reasons for the fluctuation, the reasons why perhaps rates were very high in the mid to late 1970's, came down and were, arguably, unrealistically low in the early 1980's, and now are going back up again.

Professor Page suggested that tort law hasn't changed all that much. People might argue some of the specifics of that, but it seems to us that the rates today—now, in the absence of these factors that Mr. Larsen has enumerated are now in fact reflecting the reality, the reality of what is out there in the courts, what aberrant decisions, if you will, in some States are doing to show to insurance underwriters that we have an extraordinarily unpredictable system out there. It is a system which, even if the tort law today, under the current system, if every judge in the United States were to agree on some interpretation of some point in the law, tomorrow morning it could change because there is no statute, as Mr. Banks pointed out, there is no lynch pin, there is no basic set of ground rules that afford courts an opportunity to provide some predictability and stability.

And that is why the rates are high. Mr. Larsen and Professor Page have explained why they fluctuated. They are now reflecting reality, and you want to change the rate, you have got to change that reality by passing S. 100.

Senator KASTEN. I would like to thank all the members of this panel, and frankly thank all of the witnesses today. I think this has been a very helpful and informative hearing. The record of the hearing will be held open for 2 weeks for additional statements and so that the members of the committee may submit additional questions to the witnesses to be answered for the record.

I hope you will be able to get the answers back to us as soon as possible.

Mr. STAYIN. Mr. Chairman, may we submit for the record, a copy of the letter that Mr. Hunter had sent to you last year regarding his company's situation and their experience?

Senator KASTEN. Without objection, the letter will be submitted.[1]

Once more, I thank all the witnesses here today, and the hearing is adjourned.

[Whereupon, at 1:42 o'clock p.m., the hearing in the above-entitled matter was adjourned.]

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[1] See p. 356, Serial No. 98-33, Product Liability Act hearing.

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

DES ACTION,
New Hydepark, NY, March 18, 1985.

AMY BONDURANT,
Senate Subcommittee on Commerce, U.S. Senate, Washington, D.C.

DEAR MS. BONDURANT: DES Action National wishes to submit its comments on Senate Bill 100 to the Subcommittee on Commerce. As with S. 44 and other previous versions of this bill, DES Action is opposed to S. 100 and urges the Subcommittee to defeat the bill in committee.

S. 100 places an extraordinary burden on consumers who have been injured by a product to prove negligence rather than just injury.

For DES injuries in particular, the consumers were totally unwitting, exposed—in the case of daughters and sons—before birth to a substance that can have harmful effects from 7 years old on. and as long as this generation of DES exposed children is alive—and perhaps their children—we will not know the end of the story of the medical problems in DES exposed people.

These people have suffered already. In many instances they deserve to be compensated for their injuries. To raise additional obstacles to recovering for their losses is cruel and unjustified. This legislation burdens the consumer unnecessarily with proving what the manufacturer should and should not have known, could and could not have done. The bill protects manufacturers from responsibility for their products by making it impossible for an injured party to recover if the risks were unknowable at the time the product was manufactured.

In the case of DES, some risks were knowable, although the research had not been done to discover them before the drug was widely marketed to pregnant women. Other risks, however, may or may not have been knowable, and may not be known even now—for example, whether there are increased risks of cancer as DES exposed people get older, including the mothers, as we have recently found out. (In December, medical research showed a significantly higher risk of breast cancer in mothers which could not have been known before now, as the cancer risk increases only after 20 years after the drug was taken.)

If a relationship is shown between an injury and DES exposure, an injured person should have the right to hold a manufacturer accountable for health problems that result from exposure to this drug. If even the knowable risks had been sought out before the drug was first marketed, this drug would never have been marketed.

There have been hundreds of cases of cancer, thousands of cases of pregnancy loss from DES exposure. A drug was marketed to pregnant women that should never have been. Those who manufactured it need to bear responsibility for having put this product on the market and touted it widely as a remedy for pregnancy problems—even after medical research in 1953 had shown it was not such a remedy.

DES manufacturers and distributors reaped the benefits from marketing this dangerous product. DES injured people deserve to hold them liable for years of anxiety about future unknown effects, their actual pain and suffering, in some cases even death. The provisions of this bill don't just hamper the rights of those affected to be compensated, they deny those rights by raising impossible obstacles to legal action.

We too are concerned about lengthy and expensive litigation procedures. We are horrified by the amount of money spent by defendants in DES cases, and we are saddened by how few people injured by DES have been able to bring suits because of various legal obstacles already present—from inability to identify a precise manufacturer of an interchangeable (fungible) product, to statutes of limitation based on exposure rather than discovery. These obstacles already deny these victims access to remedies for their injuries and make an unfair world even more inequitable—S. 100 would tip the scales all the way in the favor of the manufacturers, eliminating justice in product claims altogether.

Once again, we urge the Subcommittee to defeat S. 100.

Sincerely,

NANCY ADESS, M.P.H.,
Executive Director.

STATEMENT OF THE AMERICAN BAR ASSOCIATION

CONFUSION CREATED BY PRODUCT LIABILITY ACT (S. 100)

Through the course of the hearings on the proposed product liability legislation, the professors and jurists who have analyzed the legislation have generally concluded that the legislation would create confusion and invite protracted litigation for several reasons. First, the bill uses a series of novel legal standards and terms which will have to be defined by state courts that are unfamiliar with them and their intended application. In addition, because the bill slices out one area of state tort law from the general body of state tort law, cases involving both a product liability claim and a state tort law claim will be difficult to understand and administer as courts attempt to mesh disparate sets of legal rules. Finally, the conflicts among the courts of the 50 states and among the various federal courts will not be resolved in a timely manner because the bill explicitly precludes federal question jurisdiction and because the Supreme Court will rarely hear product liability cases.

1. State courts will have to construe several new, unfamilar, and unclear terms

a. General

Professor Jerry J. Phillips, University of Tennessee School of Law (Hearings on S. 2631, March 9, 1982, p. 19): It is though that a federal products liability statute would bring uniformity to the law, but it is by no means clear that this would be the result. Each state would construe the law according to its own interpretation, with resulting wide variations, and it is exceedingly unlikely that the United States Supreme Court would establish uniformity through the exercise of its certiorari jurisdiction. Tort law, moreover, has historically been an area left to state regulation and control.

Professor H. Page Keeton, University of Texas School of Law (Hearings on S. 44, April 6, 1983, p. 65): It is my opinion that the bill will not achieve uniformity and it will vastly increase the amount of uncertainty in the law in a particular state. While products liability law varies from state to state, the law of a particular state has become fairly well settled. It is my judgment that this bill if passed will unsettle the law for 10 or 15 years, and each state would be interpreting the statute in its own way. Since the language used is susceptible of varying interpretations to concrete situations, it is inevitable that conflicts will arise in the various states over these interpretations. The only way uniformity could be achieved is by way of requiring the federal courts to take jurisdiction of product liability controversies, and this would be unthinkable at the present time given the volume of cases that the federal courts already have.

Ernest Y. Sevier, American Bar Association (Hearings on S. 44, April 6, 1983, p. 106): [A] whole new area of litigation [would be] created by the uncertainty which such legislation would invoke. Constitutional challenges of the Act in whole or in part would be raised in the various state courts where jurisdiction would reside under your proposed legislation. Interpretation of various provisions of the Act would differ as state courts tailor their decisions according to the individual state's desires. Unequal results would occur when products liability litigation is combined with other fields of law with differing rules of law, for example, when a products liability claim is joined with an automobile liability claim. The proposed Act's "pure" comparative negligency rule may conflict with modified forms of comparative negligence such as the damage rules may conflict with the rules in states where no punitive damages are granted. Rules will differ in the areas of set-offs, separate settlement, joinder, contribution and indemnity. Therefore, the desire for certainty will in fact be undermined by federal legislation.

James W. Jeans, Senior Professor, University of Missouri-Kansas City School of Law (Hearings on S.44, April 27, 1983, p. 266): Professor Jeans was asked whether the bill's new legal terms would contribute to uniformity:

"Phrases which are used consistently in the law are subject to review through the appellate process and over the years their definitions become refined and they become terms of art. The incorporation of new legal phrases in the legislation necessitates that individual trail judges, uninformed by existing appellate decisions provide their individual interpretations of the new phrases. The result will be a lack of uniformity and consistency until the refining process is completed through extensive litigation."

Professor Andrew Popper of the Washington College of Law at American University (Hearings on S.44, March 5, 1984, p. 445): [The product liability bill] will not achieve uniformity because of the uniqueness and complexity of the language. It will not provide efficient and fair systems of personal injury litigation. Instead, it

will interfere with the implementation of state law in a crude and intrusive manner. It will create new standards for the role of the jury, punitive damages, and design defect cases. It will destroy clear and long-standing entitlements in a number of states in the product liability area. In no area will it provide substantially greater protection for those most at need, the injured plaintiff. Accordingly, I oppose committee approval of the October draft [of the legislation].

b. Specific Terms of S.100

Chief Justice Pope of the Texas Supreme Court (Hearings on S.44, April 27, 1983, p. 249; March 5, 1984, pp. 378-79): Chief Justice Pope was asked whether terms such as "practical technological feasibility" would contribute to uniformity and consistency in the law. He responded:

"The infusion of the many new legal terms and standards in S.44 will largely mutate the purported goals of consistency and uniformity in the law. Standards for the 'state-of-the-art' doctrine exist in the states today. Interpretation and application of the term 'practical technological feasibility' may well take on the characteristics of existing state law. The desired uniformity will not be achieved and the United States Supreme Court will be left to resolve the differences. I do not believe that the Court will be able to do so. With the tremendous number of cases tried in the state courts and with the provisions precluding any new jurisdiction for the federal courts, the Supreme Court's burden will render the law ineffective or severely hamper the administration of justice by the Supreme Court."

In analyzing the phrase, "and judgment that society expects of its members for the protection of their own interests and the interests of others," within the definition of "exercise of reasonable prudence," [section 2(4)], Chief Justice Pope concluded:

"This is novel and frightening. I frankly do not know what it means."

Chief Justice Pope finds that the bill's definition of "manufacturer" would create interpretive problems. After analyzing one clause in the bill's definition of "preponderance of the evidence," Pope concluded simply, "I do not know what that means."

Pope also found the definition of "express warranty" in section 2(5) of the bill confusing:

"A casual examination of this paragraph indicates to me that the bill is intended to supersede Restatement 402(b), and it will abolish strict liability in the case of false representations. I do not know, and we will not know until fifty-six jurisdictions start writing on whether the definition includes or excludes strict liability grounded on implied warranty."

Professor Joseph Page, Georgetown University Law Center (Hearings on S. 44, April 6, 1983, p. 158):

In hearings last year, Professor Page cited a number of terms in the bill which would cause confusion and complexity such as:

"Proximate cause," section 8(a)(1)(c); "personal physical illness," section 2(6)(B); "product," section 2(11); "available and capable of use," section 2(9); and "eliminate," section 5(b)(2)(A).

Professor Page concluded, "These terms may have to be construed by the 72 different courts having penultimate jurisdiction in product liability suits (the 50 state supreme courts and the 12 U.S. Courts of Appeals in diversity cases), with the United States Supreme Court conceivably having the last word."

Professor Andrew Popper, Washington College of Law, American University (Hearings on S. 44, March 5, 1984, p. 445): Professor Popper finds that the definitions in the bill "raise several difficult problems." He identified the terms "practical technological feasibility" [section 2(9)], "manufacturer" [section 2(7)], "reasonably anticipated conduct" [section 2(14)], and "exercise of reasonable prudence" [section 2(4)], as examples of definitions which raise difficult problems.

In discussing section 2(14), the definition of "reasonably anticipated conduct," Professor Popper notes that:

"The phrase . . . is tremendously restrictive. Rather than using the simple negligence notion of foreseeability, the drafters of the October draft chose the words 'expected, ordinary, familiar of the class of persons likely to use or be exposed to the product.' To think that this phrase will result in state-by-state judicial harmony is pure folly . . . . In light of the fact that the phrase 'reasonably anticipated conduct' is essential to liability in the design defect area, this definition becomes a critical component in limiting liability based on plaintiffs' behavior."

Professor Popper also finds section 9 internally inconsistent in terms of the applicability of contributory negligence in product liability lawsuits. According to Popper, the section at one point states that a comparative fault regime is being cre-

ated [section 9(a)], but it then later appears in the section that contributory negligence could completely bar recovery in some circumstances [section 9(e)].

Similarly, Professor Popper finds that section 9 is inconsistent in terms of its treatment of the concept of joint and several liability:

"At one point it [section 9] appears to require that the plaintiff prove individual fault in every instance for every defendant. In another section it appears to allow joint and several responsibility. . . . But in speculating on the meaning of this, suffice it to say that the section is ambiguous."

Professor Aaron Twerski, Hofstra University Law School (letter of March 16, 1984, submitted to Senate Commerce Committee, Hearing Rpt., p. 481):

Twerski states that section 3, which preempts state law, and section 9, which imposes a comparative fault regime, could be interpreted together to make comparative fault applicable to cases involving breaches of an express warranty or to cases alleging design defects that involve the failure to provide safety devices. He finds that this result would be contrary to the law of many states, and would significantly diminish the rights of injured product users.

Professor Twerski states that the definition of "harm" in section 2(6), could be interpreted to prevent an injured plaintiff from recovering lost earnings.

Professor Twerski concludes that section 5(b)(1)(A) and sections 6(b)(1) and (2) are ambiguous in requiring that the plaintiff prove that the manufacturer knew or should have known about the "danger which allegedly caused the claimant's harm." Professor Twerski states that this could be interpreted to mean that the plaintiff would have to show that the manufacturer knew or should have known about the particular risk which the plaintiff confronted or the specific harm that caused the injury, rather than about the defective nature of the product or the many potential harms the defect could cause. According to Professor Twerski, such an interpretation would significantly undercut the rights of injured product users.

With respect to section 5(b)(2)(A), Professor Twerski finds that:

"The section is simply unintelligible when placed side-to-side with section 5(B)(1). . . . This section is guaranteed to drive trial judges to drink, and will be the subject of countless appeals."

Professor Twerski finds that the meaning of section 5(b)(2)(B) is unclear, and he believes that the likely interpretation would render the test for design defect liability even less protective of consumer rights than a straight-forward negligence standard.

With respect to section 5(b)(2)(C), Professor Twerski concludes:

"This is another poorly worded section that is destined to cause courts to submit it for interpretation to the Oracle at Delphi. There are three options as to its meaning: (a) It is benign, and hence unnecessary; (b) it is a devious articulation of the patent danger rule; and (c) it is unintelligible.

Finally, with respect to the entirety of section 9, Professor Twerski states:

"This section is exceedingly difficult to analyze. This language defies understanding . . . The entire section needs to be reexamined, and recast in clear and understandable language."

Congressional Research Service (CRS) Report on the Effect of Product Liability Legislation on Legal Fees (April 27, 1984):

"The possibility of many different interpretations of the terms of S.100 seems likely to reduce significantly the prospect of uniformity because many provisions of the pending bill appear susceptible to differing interpretations. Even if, after litigation, various jurisdictions ultimately agreed on the meaning of a particular provision, there still would have been legal frees expended in the litigation. Furthermore, even if various jurisdictions interpreted a particular provision to mean the same thing, their application of it might differ. This perhaps would be unavoidable with any codification of tort law, since tort law depends so heavily on openended concepts such as reasonableness, foreseeability, and negligence. Thus, even if two jurisdictions agreed as to the meaning of the phrase "practical technological feasibility" (which is used in § 5(b)(2)(A) of S.44, they might differ as to whether a particular design change was within practical technological feasibility."

2. S. 100 will create confusion when a court must apply both federal product liability law and state tort law in the same trial

Chief Justice Pope: In 1983 hearings on product liability legislation, Chief Justice Pope explained why, under the bill, a planitiff in Texas would be unable to sue both a driver and a supplier of the motor vehicle in an action for injuries sustained during an automobile accident:

"The total preemption by the federal bill of Texas law and procedures would practically prevent one trial against both defendants. For example, the bill would enact a pure comparative system of comparative responsibility. Texas negligence law is that of a modified comparative system in that if the claimant is found to be more than 50% negligent, recovery is barred. It would not be possible to allocate responsibility under both systems in the same trial. Similar inconsistencies exist, as to evidence rules, the effect of workers' compensation set offs and punitive damages. If there were a single trial against both defendants, attempting to try the case under the special rules applicable under S.44 and under Texas law would be impractical in my opinion."

Michael L. Williams, Esq., Johnson, Quinn, Clifton & Williams, P.C. (Hearings on S.100, March 21, 1985): Michael Williams cities similar examples under Oregon law:

"Oregon does not have pure comparative fault; this bill does. What happens when an injured victim sues the driver of the car that caused the accident, as well as the manufacturer of defective brakes? The latter would be covered by purse comparative fault, the former by Oregon's modified comparative fault (if plaintiff's fault exceeds 50%, plaintiff recovers nothing), and the jury will be hopelessly confused.

"Another example: Oregon abandoned the ambiguous notion of "proximate cause" several years ago by separating it into two separate analyses: (1) Scope of manufacturer's duty; (2) Whether the product defect was a substantial contributing factor (cause in fact). How are Oregon courts to interpret "proximate cause" in the case above, where a defendant driver is subject to Oregon law on causation and duty, and the product manufacturer is subject to a "proximate cause" analysis? Again, only jury confusion and judicial disuniformity can result."

3. S. 100 would make the resolution of conflicts among state and federal courts difficult because federal question jurisdiction is precluded and Supreme Court review would be rare

CRS Report on Product Liability Legislation (April 4, 1984; revised May 10, August 24, 1984):

According to the CRS report, the product liability legislation being considered by the Congress creates a federal cause of action, but would not permit enforcement in federal courts except pursuant to diversity jurisdiction. Under diversity jurisdiction, federal courts would ordinarily hear suits arising under state law and hence, would be bound by the substantial law of the state in which it sits. *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 78 (1937). Under the product liability bill, this apparently would not be the case, since S. 44 would be a federal law, not a state law.

The report continues:

"Thus, a federal court interpreting S. 44 apparently would not be bound by state court interpretations of the bill. Would a state court interpreting S. 44 be bound by federal court interpretations of the bill? It apparently would not, except for Supreme Court interpretations. Under the Supremacy Clause, state courts must apply federal statutes (*Testa* v. *Katt*, 330 U.S. 386 (1947)) and United States Supreme Court decisions (*Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958)). However, they apparently are not obliged to follow lower federal court interpretations of federal statutes. A state court, in other words, apparently is not bound by an interpretation of a federal statute made by a lower federal court, including the court of appeals in whose circuit it sits and the district court in whose part of the state it sits."

Chief Justice H. Ward Reynoldson, Iowa Supreme Court (Hearings on S. 100, March 21, 1985):

"S. 100 would add new complexity to federal resolution of diversity cases because product cases now would be based on questions of federal law that inevitably would lead to new intercircuit conflicts which, as we have noted, are beyond the Supreme Court's present capacity to resolve. When you add conflicting opinions of 50 state supreme courts interpreting the same complex federal law, you can create a web too complex for the Supreme Court to untangle."

Chief Justice Reynoldson also warned of the possibility of forum-shopping "since federal courts are presumed to be more experienced in the application of federal law, . . . "

DEANE, SNOWDON, SHUTLER & GHERARDI,
Washington, DC, March 26, 1985.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation held hearings on March 21 concerning S. 100, the "Product Liability Act" (the "Act"). I represent and am writing on behalf of the Specialty Equipment Market Association (SEMA), a trade association composed of 1,800 members, including manufacturers and distributors of specialty and custom aftermarket parts and accessories for motor vehicles. We submit this letter as written testimony in support of S. 100 and request that it be included as part of the record of these hearings.

SEMA's membership is comprised of small businessmen whose goods travel to various states throughout the country. As a result of the present "patchwork" of product liability laws, our members lack a clear understanding of their obligations and defenses. Further, the ever-changing court-made law is increasingly imposing unreasonable burdens upon such manufacturers in terms of liability and denies them reasonable defenses. This confusion and unwarranted liability has, over the past years, forced SEMA's members to spend an ever-increasing amount of money in legal fees and for product liability insurance, costs which small busniesses can ill-afford and which they must pass on to consumers. In fact, many of our members are unable to find or afford product liability insurance in today's market. In addition, the current system threatens the continued availability of increasingly innovative products and, to an extent, the viability of the manufacturing community. SEMA, therefore, strongly supports a unified product liability law and the specific bill before your Subcommittee.

The Association supports just compensation for injuries and damages caused by wrongful conduct; however, we view the present uneven treatment of innocent manufacturers and distributors as unjustifiably harsh. Senate Bill 100 allows businessmen as well as consumers to be treated on an equal basis. We do not view the Act as ignoring consumers' interests or diminishing their legal rights. Instead, the Act lends clarity and equity to an area that, in recent years, has been without either. Certain groups seem to ignore the fact that the Act imposes safety standards higher than those presently found in many states without adversely affecting the plaintiff's right to sue. In addition, S. 100 will have a beneficial effect on prices, as well as provide an incentive for the creation of new and better products.

The marketplace in our country has become national in scope, and it is, therefore, ineffective for the states to individually address the area of product liability. There is nothing geographically unique in promoting safety, minimizing legal costs and expediting fair and full recovery for wrongfully caused injuries. A national standard is needed to end the confusion and unnecessary costs that continue to plague businessmen.

We urge your Committee to report S. 100 favorably and to support its passage through the Senate.

Sincerely,

JOHN RUSSELL DEANE III.

SPORTING GOODS MANUFACTURERS ASSN.,
Washington, DC, April 8, 1985.

Hon. ROBERT W. KASTEN, Jr.,
U.S. Senate,
Washington, DC.

DEAR SENATOR KASTEN: The Sporting Goods Manufacturers Association, on behalf of 3,900 producers and distributors of athletic clothing, footwear and equipment, urges the enactment of S. 100, the Federal Product Liability Act. Legislation of this nature is an important keystone to the continued viability of a $14 billion U.S. sporting goods industry at wholesale level, as it will help solve the more serious aspects of our members' product liability problems.

Today, many of our manufacturers are finding themselves not being able to renew insurance coverage. The reason for this precarious situation is in the strict liability system, that has made the sporting goods industry a "deep pocket" that is constantly exploited by the trial bar. Some of our companies, whether they produce helmets, boxing equipment, camping goods, or exercise equipment, have contacted as many as 40 carriers before one would agree, at the eleventh hour, to quote a rate. In other

instances, manufacturers and distributors have been unable to secure coverage at any price. We have been told by the insurance industry that the sporting goods industry has been placed on the prohibited list. Because of the present liability system, insurance companies have made the determination that the exposure of sporting goods companies is too great for them to continue to assume.

Insurance rates are now accounting for 20% of the wholesale cost of contact sports equipment. A large number of our manufacturers this year, are now faced with paying more than 10 times the premium they paid last year, for less coverage. As an example, one manufacturer raised his price for a sporting goods product from $40 to $58 and still didn't recover all of his costs. Last year, the company paid $8,000 for $1,000,000 worth of coverage, with no deductible. This year, he is paying $85,000 in premium for $500,000 coverage with a $50,000 deductible. He has just one claim against him, where the injured party may not have even used his product, and admits that he was on "speed" when injured.

A gymnastic equipment manufacturer has been involved in a case approaching 10 years, as a third party. The piece of equipment that is being held responsible for a claimant's injury was not produced by the manufacturer involved. In fact, the equipment is no longer being produced, and the claimant only has a blurred picture of the product he alleges caused his injury. Yet, the manufacturer cannot get himself extricated from the case, and is paying 10 years of legal costs.

Under the present product liability system, sporting goods manufacturers are being held liable for: Injuries that were not their fault; injuries caused by misuse of product; improvements to product; and failure to warn sufficiently that sports involves risk.

It is interesting to note, that while most sporting goods *do* have warning labels affixed to them, it is not the product that causes injury, but user behavior. The strict liability system has caused a continuous erosion of traditional defenses available to the sporting goods industry, along with a diminishing demand for individual responsibility. In addition, the propriety of exposing a manufacturer to millions of dollars in damages for some design aspect of a product that has been in wide use for many years, but nevertheless in a great many instances is redesigned in the jury room, poses another aspect of the strict liability system, which can be viewed as unfair.

As an industry, we believe that persons injured through no fault of their own should be recompensed. And, manufacturers with inferior products should be made to pay. But the existing tort liability system doesn't usually work that way. The firms being sued are reputable companies, whose only real fault is being large enough to have sufficient insurance to be a target. Many people do not realize that huge awards cost everybody in the end. The doctrines of entitlement and strict liability have come full circle to kick the consumer right in the pants.

Over the years, serious injuries associated with the playing of competitive sports have declined dramatically. This is due to the industry's self regulation, its technological innovations in making a product as safe as possible, and the training of sports officials involved in amateur sports activities. In the eyes of the sporting goods industry, there are really no triable issues of fact in failure to warn cases, which by and far, are the majority of cases affecting our manufacturer. A manufacturer has a "duty to warn" of inherent dangers in a products where the risks are not obvious to the consumer. Sporting goods products are not inherently dangerous, that is the Catch 22. No matter the number of trainers, well-placed spotters, and conditioned athletes, when a gymnast uses the high-bars, he/she goes up in the air and must come down. Being in the air is an assumable risk knowingly undertaken. If an injury should occur, blame should not be placed at the door of the manufacturer.

Failure to warn, as it affects this industry, is a scam perpetrated by the trial bar to give themselves a full employment plan. Regardless of the warning, someone can always make the case that it is inadequate. There is no scientific fact that stipulates that certain language in a warning will mean the same thing to all people.

The issue facing Members of Congress in regards to support of a Federal Product Liability bill is simple: Those who believe in the need for a well crafted bill that the Senate has spent almost 10 years developing, are of the mind that the survival of sports in this country is important. Those that oppose the bill, are ready to say to their constituents that there should be no "U.K." basketball team, nor "Alabama" football team, nor Little League, Say Soccer, or Pop Warner Football sports organizations . . . because that will be the road America takes without a federal solution to the products liability crisis.

We need a federal bill that establishes uniform guidelines and returns liability governing product design and warning cases to a negligence standard. Without a

federal bill, the insurance industry will continue to refuse coverage for the sporting goods industry, and the legal extinction of ours and other U.S. industries will continue unabated, as will the interscholastic and recreational youth sports programs and activities that touch 57 million youth throughout this country.

Thank you for providing our industry with the opportunity to present its case in support of S. 100.

Sincerely,

MARIA DENNISON,
Director, SGMA Washington Operations.

STATEMENT OF HON. JOHN D. DINGELL, U.S. REPRESENTATIVE FROM MICHIGAN

Mr. Chairman, if there is one area of our litigious society where "the jury is in," it is product liability litigation. Quite simply, our legal system has demonstrated that it is incapable of reaching consistent and equitable results in product liability actions. Injured parties, innocent manufacturers, and indeed the public at large have a right to expect fairer treatment. I commend you and this Committee for addressing this tangled web of legal confusion and inequity that clearly warrants a Federal legislative solution.

How has our legal system broken down? First, it is clear that the system does not fairly and efficiently identify and make whole individuals who are injured by defective products. Product liability litigation is far too costly, takes far too long, and leads to decisions which are far too inconsistent. It is unfair for one injured party to have his case thrown out of court at the same time that an individual in an adjoining state, suffering the same injury due to the same defect in the same product, is awarded a substantial judgment. Second, there is ample evidence that manufacturers and sellers who meet the highest standards of conduct do not necessarily prevail when law suits are brought against them, nor are they protected from plaintiffs who seek to use the onerous processes of our legal system as a threat to extract a settlement where none may be warranted. Third, and equally important, it is evident that the insurance industry can no longer assess accurately future risk in product liability cases, fairly and efficiently allocate that risk and set insurance rates accordingly. As a result, society has lost the beneficial effect which insurance ratings could have on the care with which manufacturers produce their products. Product liability insurance rates for all manufacturers have increased, and this added cost has been passed on to consumers, without any real benefit attached.

Why is the system not working? In part, it is because the natural development of the common law and responses by state legislatures and state courts have led different states in different directions. Only 33 states even have product liability statutes. None of these state laws are comprehensive, and no two are identical. Over 70 percent of the products made in the United States are transported in interstate commerce for sale in another state, yet we have no uniform national statute to clearly establish the extent of an injured party's right to recovery and the standard by which a manufacturer's liability will be determined.

Another reason the system is not working is that the "transaction costs" associated with product liability have esclated beyond any reasonable level. The uncertainty about the legal standards to be applied has given rise to appeal after appeal in these cases, with increased legal costs and added delay in getting recovery to the injury party. Two out of every three dollars spent on product liability actions never get to the injured party. When we in the Congress express our great discontent with government social service programs that consume one dollar for every three which get to the population served by the program, how can we tolerate a private payment system under which two out of every three dollars spent never get to the target population?

Mr. Chairman, we all have heard the "horror stories" that are circulating about product liability cases—from both sides of the debate. What all this tells me beyond any doubt is that the system needs to be reformed.

As you know, Mr. Chairman, controversy is no stranger to these issues and tough battles lie ahead, for many fear that changes in the status quo may ultimately create a greater legal swamp or arbitrarily curtail the rights of victims. I am convinced, however, that the Congress can enact a set of uniform, predictable and balanced ground rules that will treat fairly the legitimate interests of injured parties, manufacturers, insurers, and, yes, the lawyers.

In the Second Session of the 98th Congress, legislation reported by this Committee was not considered by the full Senate, and, in view of the shortness of time remaining in the session, the House took no action. I am hopeful that product liability leg-

islation will not fall victim to the legislation clock in the 99th Congress and pledge once again to make my best effort to have such legislation addressed in the house in a timely fashion.

Again, Mr. Chairman, I commend you and the other Members of this distinguished Committee for your efforts to fashion a sensible and equitable solution to this vexatious problem and look forward to working with you toward that end.

STATEMENT OF PHILIP P. FRIEDLANDER, JR., EXECUTIVE VICE PRESIDENT, NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION

My name is Philip P. Friedlander, Jr., Executive Vice President of the National Tire Dealers and Retreaders Assocaiton. NTDRA is a National noprofit trade assocaition represenating approximately 5,2000 independent tire dealers and retreaders located in all fifty states. NTDRA's members are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires and the sale of related products and services.

Mr. Chairman, on behalf of NTDRA's membership, I appreciate this opportunity to once go on record as supporting the call for a uniform product liability law. Such a law is long overdue, and NTDRA commends you, Mr. Chairman, for reintroducing this issue before the U.S. Senate in the form of S. 100.

Product liability has become an increasingly serious problem for manufacturers and product sellers alike. NTDRA is in a position to know, serving as it does both retread tire manufacturers and new tire distributors. However, as will be shown, product liability presents problems for consumers and insurers as well. Clearly, there is a need for federal legislation to address these concerns. Legislation is needed which will set forth definiite and uniform legal theories under which manufactrers, product sellers, insures and claimants will know their rights and respnsibilties rlative to defective products.

At present, product liability rules are determined almost exclusively by judges in state courts. These rules vary from state to state, and even within each court. For this reason, manufacturers, product sellers, consumers and insurers alike must endure an uncertain, contradictory and ever-changing environment which obscures individual obligations and legal rights. The only winners in such a system are the attorneys who receive large legal fees for litigating this confusing maze of rules. As indicated in a recent Rand Corporation study, for every $59 paid to claimants in a product liability case, $99 is paid for legal services by both claimants and defendents.

Moreover, since March 5, 1984, when NTDRA last submitted testimony on behalf of product liability before the Congress, the number of product liability suits filed in Federal District Courts has continued to climb. Indeed, since 1974, the number of such suits has risen by more than 680%—increasing from 1,579 suits in that year to 10,745 suits in 1984!

While attorney's are winners in this situation, certainly our consumer-oriented economy is the loser. It is weakened by the higher prices which we all pay for products due to the absence of a uniform product liability law. So, too, is it weakened by the creation of disincentives for U.S. manufacturers (such as the retread industry) to embrace new technologies to improve their products and increase their productivity. Under the current product liability system, manufacturers have reason to fear that product improvements may be used against them as evidence that an older product is defective. Logically this concern might be particularly pronounced in those industries where technology is rapidly advancing, such as tire manufacturing. And, once again, the economy is weakened when American small business—the mainstay of the economy—is unable to secure loans due to pending product liability suits which threaten them with bankruptcy. Significantly, the existance of 51 sets of conflicting rules probably impacts disproportionately hard on small business which is usually dependent upon outside counsel.

Uncertainty in product liability law, moreover, has an adverse effect on product liability insurance. It makes it very difficult, and often impossible, to predict the number of claims and losses a manufacturer can expect. As with legal costs, which ultimately must borne by the consumer in the form of higher prices, soaring insurance rates under the present product liability system weigh heavily upon our national economy. And, once again, small business is more likely to be severely impacted by the negative growth effects of rising product liability insurance than is large business.

Because product liability insurance rates by necessity were set increasingly on a subjective basis during the 1970's, and were often overpriced, some companies were

unable to afford protection. And, "going bare" presents the prospect that a single judgement might force a company out of buisness! This situation led Congress to approve the Risk Retention Act of 1981. This act, which NTDRA supported, offered manufacturers and product sellers a competitive alternative to commercial product liability insurance, through the establishment of risk retention or self-insurance groups.

Despite this effort, NTDRA felt compelled to stop offering product liability insurance to its membership last year due to prohibitively high rates. The numbers speak for themselves. During the 1981-82 period, the coverage rate for the product liability insurance, which NTDRA offered its members, equaled 5.75 cents per retreaded tire. During 1982-83, it climbed to 6.75 cents per tire, while over 1983-84, it reached 7.50 cents per tire. By June, 1984, the cost jumped to 11.50 cents per tire. NTDRA, at this point, no longer felt it could recommend an insurance package at such a rate to its members.

The Risk Retention Act, moreover, did not address the uncertainty found in today's outmoded, fragmented product liability tort litigation system. The diversity in current law, as well as the prospect of constant revision or reversal, clearly makes the current product liability system incompatible with the economic environment in which products are manufactured, distributed and sold, and transported in interstate commerce. For example, from the manufacturer's perspective, state laws differ so greatly that there exists no feasible way to predict whether a product complies with any one or all of the state product liability statutes.

With passage of S. 100, state courts will no longer be free to interpret product liability law as they wish. Rather, they will be required to follow and apply federal court decisions in interpreting the Product Liability Act. Consequently, benefits will accrue to all concerned. Insurers, unable under the present system to predict or measure potential risks to their insurers, will operate in a more predictable environment. No longer will they feel compelled to hedge against uncertainty with higher consumer rates—because the insurance market itself will no longer be subject to sharp swings in cost within the realm of product liability. In sum, passage of S. 100 is critical to both the near and long-term ability of manufacturers and product sellers to manage their product liability loss exposures.

Likewise, product manufacturers, such as our retreader members, will be able to produce goods more confidently under a single set of rules which specify exactly what is expected of them to ensure product safety. S. 100 simplifies current practice by utilizing four actionable categories for classifying clear types of product defects. Hence, S. 100 places the focus upon what is wrong with the product. Manufacturers will remain liable if the claimant can establish by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product failed to conform to an express warranty.

Similarly, S. 100 clearly spells out the responsibilities of product sellers. They would remain liable if the claimant can establish by a preponderance of the evidence that (a) the harmful product unit was sold by the defendant; (b) the product seller failed to exercise reasonable care with respect to the product; and (c) such a failure was a proximate cause of the claimant's harm. Liability would be incurred if the product seller made an express warranty, independent of any express warranty made by the manufacturer regarding the same product, to which the product failed to conform, thereby causing the claimant harm.

Hence, under S. 100, wholesalers, distributors, retailers and other product sellers who are not manufacturers will receive fair and just consideration as to their possible liability for claimant injury. They, too, will remain liable for harm caused by failure to use reasonable care, for misrepresentations and in cases where the plaintiff is unable to sue the manufacturer.

Nor would S. 100 diminish the rights of product users. Because of the stringent standard of care placed upon the manufacturer and product seller, each has no place to legally hide under S. 100. Nor would the proposed legislation reduce the amount of damages paid to persons injured by defective products. Rather, S. 100 contains various provisions that ensure that the one who is responsible for the harm will be the one to pay. Pinpointing responsibility promotes product safety. Moreover, S. 100 adopts a very pro-consumer statute of limitations. A claim may be brought any time within two years after the claimant discovers or should have discovered both his harm and its cause.

In conclusion, Mr. Chairman, over 30 states presently have some form of product liability statute. However, no state statute fully defines the basic rules of liability in a product-related case. Consequently, the uncertainties in today's tort litigation system remain. Individual states simply have not been able to respond to this situa-

tion. Legislation enacted by one state can do little to resolve this problem of uncertainty, since most manufactured products enter into interstate commerce beyond the reach of that state's statute. At present, according to the U.S. Department of Commerce, only about 30% of manufactured goods are consumed in their state of manufacture. Thus, we have a modern interstate marketplace trapped in a fragmented product liability tort litigation system.

Mr. Chairman, for all the reasons enumerated above, a federal solution to product liability should be promoted. The National Tire Dealers and Retreaders Association, therefore, strongly urges this committee to provide the necessary leadership in reporting out S. 100 at the earliest possible date. It is our hope that the 99th Congress will meet the challenge of clarifying and, hence stabilizing the existing product liability system so that unmeaningful compensation mechanism can be developed. We all have a vested stake in product safety—and fairness to all the participants of our economy. S. 100 points in that direction.

Thank you, Mr. Chairman.

STATEMENT OF PAMELA GILBERT OF THE U.S. PUBLIC INTEREST RESEARCH GROUP

The United States Public Interest Research Group (U.S. PIRG) joined the testimony presented on March 21, 1985 to the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation on behalf of the Consumer Federation of America, Public Citizen and Consumers Union opposing Senator Robert Kasten's Product Liability Act (S. 100). In particular, we share their concerns that S. 100 would make it significantly more difficult for people who are harmed by defective products to receive compensation for their injuries. This would threaten the well-being of all consumers because it would substantially decrease manufacturers' incentives to produce and market safe products.

U.S. PIRG is submitting this separate testimony to analyze the effects that S. 100 would have on victims of toxic substances in the environment.

Senator Kasten has introduced bills twice before to establish federal product liability law.[1] With few exceptions, S. 100 is identical to these previous bills. This testimony will examine section 3(c), a new provision that was added to the bill at the request of Senator Robert Stafford.

Section 3(c) states that S. 100 should not be construed to supersede state or federal environmental laws. U.S. PIRG applauds the intent behind Senator Stafford's effort to prevent S. 100 from exacerbating the already formidable obstacles facing victims of exposure to hazardous substances in the environment.

However, careful analysis of section 3(c) indicates that S. 100 would still require many victims of toxic chemicals to pursue compensation for their injuries under the restrictive legal standards set out in the bill. Moreover, even those lawsuits which appear to be exempted by section 3(c) may nevertheless be interpreted by some courts to fall under the juridiction of S. 100. One point is clear—the passage of S. 100 would lead to years of protracted and complex litigation over the exact scope of section 3(c), and would not serve its purpose of protecting the legal rights of all victims of toxic chemicals.

TOXIC TORTS

Exposure to toxic substances in the environment has caused an alarming number of diseases and injuries. Clinical studies show that thousands of people have died or are seriously ill as a result of exposure to hazardous chemicals such as asbestos, dioxin, polychlorinated biphenyls (PCBs), polybrominated biphenyls (PBBs), benzene and mercury.[2] Most recently, over 2,000 people were killed and hundreds of thousands more were permanently injured by the release of methyl isocyanate at Union Carbide's pesticide plant in Bhopal, India. A recent congressional survey reports that hundreds of factories are currently releasing thousands of tons of cancer-causing substances and other hazardous materials into the environment.[3] Although no amount of money can make up for the human anguish that exposure to these toxic chemicals has caused and continues to cause, the innocent victims need and deserve compensation for their expenses, lost wages and pain and suffering. These losses often exceed tens of thousands of dollars for each victim.

Section 3(c) specifically states that S. 100 would not affect the state and federal environmental statutes that deal with the problem of environmental pollution. However, no federal environmental statute and few state statutes explicitly provide a

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cause of action for the personal injury claims of victims, and most courts will not imply a private right of action from environmental protection statutes. Therefore, most victims of toxic exposure sue for compensation under common law tort theories.[4]

SPECIAL PROBLEMS IN TOXIC TORT LITIGATION

Victims of toxic torts have more difficulty recovering for their injuries than do most other victims of defective products. One reason for this is the problem toxics victims face in proving causation. Unlike victims of ordinary torts in which the cause of the injury is usually immediately apparent, toxic tort victims are often unable to establish a cause and effect relationship between exposure to a chemical substance and their injury. The difficulty of proving causation is the primary reason that 200,000 Vietnam veterans and their representatives agreed to settle their lawsuit against the manufacturers of Agent Orange for far less money than can adequately compensate for their deaths and permanent disabilities.[5]

Another barrier that can be especially difficult for toxics victims to overcome is proving that the manufacturer was negligent in producing the harmful chemical or in failing to warn of its dangers. In many toxics cases it may take years, even decades, before victims discover their injuries and their causes. Therefore, to prove negligence, toxics victims would have to prove what the manufacturer knew or should have known many years in the past. This would be difficult, and at times impossible, because the evidence of what the manufacturer knew years before may have been destroyed. Moreover, the lapse of time makes it hard to determine what the manufacturer should have known about the scientific knowledge that was available when the product was made. For example, some courts have been unable to determine when asbestos manufacturers should have been aware that inhaling asbestos dust causes asbestosis.[6]

To overcome the problem of proving negligence, victims of environmental injury often use strict product liability as the basis for recovery. The provisions of S. 100 which require a victim of a defective product to prove that the manufacturer was negligent in designing the product or in failing to warn of its dangers would add a significant and costly burden to the difficulty of proving causation that already faces toxics victims. Section 3(c) was added to S. 100 in an attempt to prevent the bill from reducing any further the rights of toxics victims to recover from the parties responsible for their injuries.

THE SCOPE OF SECTION 3(C)

Section 3(c) provides that S. 100 does not supersede "any law relating to a civil action . . . if the loss or damage for which a remedy is sought is caused by the release into the environment, or the threat of release into the environment, of a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollution." (emphasis added).

However, section 3(c) would not exempt all toxic tort lawsuits from the jurisdiction of S. 100. For example:

(1) Section 3(c) would not exempt cases arising as a result of the presence of toxic chemicals in a workplace from being governed by the standards of S. 100 since the definition of "release" in section 3(c) excludes "any release which results in exposure to persons solely within a workplace."

S. 100's requirement of proving a manufacturer negligent in failing to warn of the dangers of chemicals in the workplace would make it impossible in some cases for toxics victims to receive compensation for their injuries. See e.g., *Beshada* v. *Johns-Manville Products Corp.* 447 A.2d539 (N.J. 1982) (In strict liability, injured workers may recover without proving that the manufacturer should have known about the dangers of asbestos.); *Freund* v. *Cellofilm Properties, Inc.* 432 A.2d 925 (N.J. 1981) (In inadequate warning design defect cases, a strict liability charge should be given where plaintiff was injured by exposure to a chemical at work.); *Borel* v. *Fibreboard Paper Products Corp.* 493 F.2d 1076 (5th Cir. 1973) (manufacturers strictly liable in tort for damages for asbestosis and mesothelioma contracted over a thirty three year period by an industrial worker.).

Moreover, by relieving manufacturers of liability if they did not know or should not have known of the dangers of their products, S. 100 removes incentives for manufacturers to discover the dangers and potential dangers of their products. This can be particularly devastating when large numbers of workers will be exposed to the product over a long period of time and the product's dangerous effects are not apparent for many years.

(2) The definition of "release into the environment" may limit the scope of section 3(c) in some instances of toxics exposure outside of the workplace.

S. 100 specifies that the word "environment" as it is used in section 3(c) has the meaning the term is given in section 101(8) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [hereinafter CERCLA]. The CERCLA definition of environment was designed to identify sites of hazardous wastes and toxic spills in order to allocate money for cleanup from the federal "Superfund." The definition, however, is not easily applicable to product liability lawsuits and would raise difficult issues of its precise scope in countless lawsuits.

A 1975 case from New Mexico provides a good illustration. In that case, the children of Ernest and Lois Huckleby were left permanently blind and paralyzed and their son was born with birth defects as a result of eating a hog who had been fed grain treated with a chemical that contained mercury. The Hucklebys sued the manufacturer and distributor of the chemical under five different common law tort theories, but the court rejected every claim except for strict product liability and failure to warn. *First National Bank, Albuquerque* v. *Nor-Am Agricultural Products, Inc.* 537 P.2d 682 (Ct. App. N.M. 1975). In other words, under the standards of S. 100, the Hucklebys would probably have lost their case.

Therefore, had S. 100 been the law in 1975, the issue of whether it applied to this case would have been crucial to the outcome. The defendants would have made the reasonable claim that under section 3(c), "release into the environment" does not include the chemical treatment of grain, and thus, S. 100 should govern the lawsuit. Mr. and Mrs. Huckleby would have made the equally reasonable claim that the definition does include such treatment, which would allow them to proceed under state common law. The issue of the scope of section 3(c) would have added an additional confusing and complex layer of litigation to the already costly and time-consuming process of litigating a traditional tort suit.

Section 3(c) would raise similar issues in case after case. For example, was a woman who was blinded by a chemical that was released inside an office building harmed by a "release into the environment?" Are injuries from inhaling toxic chemicals in art supplies caused by a "release into the environment"? If someone contracts asbestosis from washing the clothes of an asbestos worker, has that person been injured by a "release"? Are respiratory ailments from Scotchgard fabric spray caused by a "release into the environment?"

Far from injecting certainty into the law and reducing transaction costs, S. 100 would further complicate and confuse the issues in many product liability lawsuits. What is more, under the scheme of S. 100 in which state courts interpret the federal law, these questions may be answered differently from state-to-state, undercutting the stated goal of S. 100 of establishing uniform product liability law.

(3) Under the most narrow reading of section 3(c), put forward by some supporters of S. 100, its exemption would apply only to environmental statutes or the common law of nuisance, ultrahazardous activity or contamination or pollution of the environment.[7] According to this interpretation, S. 100 would still govern the product liability claims in all personal injury lawsuits brought under the common law, even if the injury was due to a toxic release into the environment.

Since victims of toxic exposure rely increasingly on product liability, this interpretation could have a significant negative impact on environmental litigation. For example, in at least one complaint that has been filed against the Union Carbide company on behalf of the victims of the tragedy in Bhopal, India, the primary allegations are defective design of the storage facility and failure to warn about the dangerous condition of the methyl isocyanate plant.[8] In the Agent Orange litigation, the Vietnam veterans claimed that the chemical companies should be strictly liable for producing an unreasonably dangerous product.[9]

The issue of whether S. 100 would apply to these and similar lawsuits would probably be litigated in each and every case. After all, the choice of which legal standard governs a lawsuit often determines how it progresses, how much it costs and who wins. In addition, a complex legal issue like this one gives the defendant an excellent opportunity to prolong and confuse the case, in the hopes of wearing the victims out until they accept a settlement.

CONCLUSION

Even with the addition of section 3(c), S. 100 will make it more difficult for many victims of toxic torts to receive compensation for their injuries. Moreover, passage of the bill will lead to years of litigation over the interpretation of section 3(c), with no guarantee that each state will interpret it in the same way. Contrary to the stated intent of S. 100 of reducing transaction costs by creating a uniform law for product

liability, section 3(c) of S. 100 will throw the growing number of environmental lawsuits into a morass of confusing choice of law issues, increasing legal costs while delaying and often reducing recovery for victims.

U.S. PIRG is a national, nonprofit, nonpartisam research and advocacy organization which serves as the Washington, D.C. lobbying office for state PIRGs across the country.

FOOTNOTES

1. S. 2631 was reported favorably out of the Senate Committee on Commerce, Science and Transportation on October 1, 1982. S. 44 was introduced into the Senate Commerce Committee on January 25, 1983 and was reported favorably on March 25, 1984.

2. *Health Effects of Toxic Pollution: A Report from the Surgeon General,* Reports prepared by the Surgeon General, Department of Health and Human Services and the Congressional Research Service, for the Committee on Environment and Public Works, U.S. Senate, August 1980, pp. 153-312; "The Occurrence of Asbestos Among Insulation Workers in the United States," 132 *Annuals NY Academy of Science* 139 (1965).

3. "Very High Levels of Toxic Material are Found in Air," *The New York Times,* March 26, 1985, p. 1.

4. James R. Zazzali and Frank Grad, "Hazardous Wastes: New Rights and Remedies," 13 *Seton Hall Law Review* 446 (1983).

5. "Agent Orange Proposal Pegs Payment to Severity," *The Washington Post,* February 28, 1985.

6. *Beshada* v. *Johns-Manville Products Corps.* 447 A.2d 539, 543 (N.J. 1982).

7. Conversations with staff of Senate Commerce Committee, February 7 & March 19, 1985.

8. *Complaint of Mrs. Sheela Bai Dawani and Rehman Patel* v. *Union Carbide Corporation,* Case No. 84-2479, U.S. District Court for the Southern District of West Virginia, December 7, 1984.

9. *In re Agent Orange Product Liability Litigation,* 635 F2d 987 (2d Cir. 1980).

STATEMENT OF HON. CEC HEFTEL, U.S. REPRESENTATIVE FROM HAWAII

Mr. Chairman, thank you for inviting me to testify before this subcommittee today in opposition to S. 100, which would establish a national product liability law.

I, like millions of Americans each year, was seriously injured by a hazardous product. My dealings with a major manufacturer in the aftermath of my automobile accident affords a personal perspective that illuminates many of the issues you are considering today.

My personal experience demonstrates to me that our current state-by-state tort litigation system remains the single most effective means of deterring corporations from marketing unsafe products. Multi-million dollar damage awards often provide a better incentive for responsible corporate behavior than government fines or meaningless injunctions. S. 100, if enacted, would preempt state judgment standards in product liability cases, standards that have been developed over time to respond to prevailing conditions in various jurisdictions. This flexible mechanism of redress assists injured parties in recovering compensation for injuries from defective products, and provides a tangible incentive for manufacturers to design and manufacture safe products.

The most disturbing aspect of the proposed legislation is that it represents significant erosion of the consumer's ability to recover compensation for injuries due to defective products. By imposing almost insurmountable burdens of proof, this legislation would complicate the process of victim compensation. In addition, it effectively insulates manufacturers by establishing additional defenses. S. 100 shifts the central issue in personal injury litigation away from the defective nature of the product to the conduct and motivations of the manufacturer.

By imposing a negligence standard for defectively designed products, a court would require the claimant to prove that a manufacturer had prior knowledge of the unreasonably dangerous nature of the product. It is virtually impossible for a court, let alone plaintiff and counsel, to obtain sufficient information needed to prove this. Currently, in most states, strict liability standards are available in judging design defect cases, although conduct is also often considered. Strict liability is based on whether or not the product was defective, and whether or not the defect caused the claimant's injury.

Under the negligence-based standard in S. 100, there would be a clear monetary incentive for manufacturers to conceal or destroy evidence of prior knowledge of defects. There are already examples indicating that this irresponsible practice occurs all too frequently under current standards where negligence is at question.

In the 1980 GM X-car case, for example, the Justice Department is currently attempting to prove that GM had prior knowledge of braking defects in almost 1.1 million automobiles. In the request for summary judgment in the X-car case, Justice notes no less than 16 misrepresentations or omissions by GM, and charges the company with ". . . seriously impeding . . ." the National Highway Traffic Safety Administration (NHTSA) investigation of brake defect complaints. In fact, GM failed to acknowledge the existence of its own research on X-car braking problems until engineering files were subpoened by the government, testifying under oath that testing related to the braking defect was only conducted in 1983. The subpoenaed files, over 100,000 poorly duplicated documents, submitted unfiled and unindexed in a stack 60 feet high, took literally months to organize, and indicate that GM knew of inherent defects as early as 1977. This, however, has yet to be proven in court. Judgment in the X-car case is not expected until at least December, 1986, and appeals could drag the final determination out for years afterward.

NHTSA has reason to believe that braking problems also exist in pre-1984 X, A and J body cars. I was injured in a 1983 A style car. Recently, based on a NHTSA investigation of 448 A and J-car brake defect complaints from consumers, the agency requested GM to initiate a voluntary recall for 1982, 1983 and 1984 A-cars. A letter from NHTSA Acting Director of Defects Investigations Enforcement Branch Philip W. Davis to GM dated January 3, 1984, stated:

"After reviewing all available information on this subject, we believe that a significant safety problem exists among 1982-1984 GM A-cars which involves the potential for rear brake lockup, vehicle control loss, and personal injury. . . . Please advise me in writing of what action GM intends to take concerning this matter. If GM does not take appropriate corrective action, I will recommend that a formal Defect Investigation be opened."

So far as I have been able to determine, no response from GM has been forthcoming.

It is interesting to note that after my accident, GM purchased the wreck from the insurance company. In addition, 5 months after the accident, I received a letter from GM indicating that I had purchased a car with a potential defect which could result in sudden, unanticipated brake failure which could produce an unanticipated collision.

Since automobile manufacturers factor legal expenses into the cost of doing business, they are able to continue to market defective products. Meanwhile, NHTSA received 21,000 safety defect complaints from consumers in 1982, 29,000 in 1983 and 50,000 in 1984. The government's mechanism of deterring marketing of unsafe automobiles moves slowly and ineffectively when compared with personal injury litigation. The strict liability standard applied in most states centers on whether or not the product was defective and whether the defect caused injury. This is a simple and clear deterrent to manufacturing unsafe cars. A negligence standard would accomplish the opposite, by creating an incentive to conceal information and evade the intent of the law, practices to which manufacturers have already proven they are not above resorting.

In another, even more disturbing example than the GM X-car case, manufacturers of the Dalkon Shield contraceptive device were alleged to have destroyed incriminating documents.

I believe that imposition of a national design defect standard may foster even more of this type of behavior and thus circumvent the intent of this legislation. Beyond this, it would certainly place the claimant at the mercy of the defendant manufacturer, because the only place where evidence of prior knowledge can be found is within the files of the defendant itself.

A strict liability standard can be effectively and fairly judged without the cooperation and complicity of the defendant manufacturer. Under a negligence standard, the manufacturer at the outset controls the information needed to prove foreknowledge of unreasonable danger. The trier of fact under these circumstances depends on the good faith and responsibility of the defendant, matters which are subject to question because of the very nature of the case.

Some states, not as progressive as the lovely state I represent which applies a strict liability standard in design defect cause of action, currently emphasize negligence standards. S. 100, however, imposes a series of test which make negligence much more difficult to prove even under these conservative standards. Further, S. 100 mitigates the manufacturer's responsibility by allowing several limitations to

the "unreasonable danger" test. For example, under the S. 100 negligence standard, a product could not be judged unreasonably dangerous unless a means to eliminate the danger was within "practical technical feasibility."

In the manner, S. 100 expands defenses available to manufacturers, while making it more difficult and costly for injured parties to recover compensation. Beyond this, it may also erode the consumer's ability to receive competent legal counsel in personal injury cases. Because individuals are often ill-equipped to take on legal departments of major manufacturers, injured parties depend on representation by attorneys who believe a reasonable chance of winning an award exists. While I recognize that this is not the best of all possible worlds, it does create an incentive for effective legal counsel. By making it more difficult for a claimant to prove entitlement to compensation, this bill will also reduce a claimant's ability to attract competent legal representation.

In a world of increasingly complex and potentially hazardous products, there should be greater incentive for industry to manufacture safe goods. This legislation is rife with provisions reversing judgment standards carefully developed in response to changing conditions and circumstances by common law in the several states. Under this bill, state courts will be required to interpret standards set forth in a federal statute. The uncertainty surrounding interpretation of these new standards by the state courts would negate any claimed benefit uniformity under federal law.

The ultimate effect of the law would be the imposition of standards that favor defendant manufacturers over injured parties, creating further incentives to irresponsible corporate behavior which may result in the death and injury of unsuspecting consumers. Product liability laws exist to provide redress to injured parties, and to insure that inherent safety hazards are addressed long before a product leaves the plant. I urge you to reject this proposal, which fails to accomplish these purposes. Thank you very much.

STATEMENT OF ELIZABETH LANGER ON BEHALF OF THE NATIONAL WOMEN'S HEALTH NETWORK

The National Women's Health Network is a nonprofit public interest organization devoted entirely to health issues as they affect women. The Network represents more than half a million women in the United States and has several state affiliates as well as 300 organizational members.

As women who are actively involved in health matters, we have seized every opportunity over the last two years to make our opposition to the Kasten bill known. It is not coincidental that the most vocal opponents of S. 100 have been women's groups, consumer organizations, trial lawyers, and judges associations. This is because the legislation seeks to achieve uniformity in tort law by incorporating those legal standards, procedures, and defenses in the fifty states that are most favorable to manufacturers and product sellers and, most destructive to people injured by defective products, including drugs and medical devices.

One of the key provisions of the Kasten bill, 5(b), is the elimination of strict liability for injuries caused by design defects. Instead, a plaintiff would be required to prove negligence. As you know, the doctrine of strict liability in tort law has evolved to simplify the required proofs in product liability actions. Under the theory, a plaintiff can recover damages if it is proved that a defective product was the proximate cause of the injury. Requiring proof of the manufacturer's negligence, in addition to proximate cause would have the effect of barring some recoveries altogether, and creating complex proof issues and longer, more expensive trials in others.

The case of Pamela Van Duyn in Eugene, Oregon demonstrates the impact of the elimination of strict liability in a Dalkon Shield case. Van Duyn developed a severe pelvic infection from a Dalkon Shield which limited her ability to conceive. The Dalkon Shield was designed with a tail string which acted as a conduit or ladder enabling bacteria to ascend into the normally sterile uterus, a process described as "wicking". Evidence demonstrated that the company had failed to test the tailstring adequately before marketing the device. The federal district court jury in Oregon reached a unanimous verdict finding A.H. Robins guilty of marketing a "dangerously defective" product, but did not find negligence. Accordingly, the judge ruled that the jury's $295,000 damage award could not be recovered because negligence had not been proved. Under a strict liability standard, Van Duyn would have received her award.

Moreover, in law suits against drug companies or other product manufacturers, the evidence needed to prove negligence—the state of mind of the drug manufacturer—is largely in the exclusive possession and control of the defendant. Robins has

been castigated by federal courts several times in recent memory for its destruction of vital documents relating to the Shield. The burden of proving negligence under these circumstances is awesome indeed.

Another serious problem with the legislation is that a plaintiff would have to prove that a design defect existed at the time of the product's manufacture in order to recover. Would this allow a manufacturer to sell a product he learns to be dangerous only after the time of manufacture? Yes, according to the Kasten bill. Take the case of Rely Tampons. Assuming for the sake of argument that evidence linking Rely tampons to Toxic Shock Syndrome was not available until after its initial manufacture, shouldn't Rely be considered an "unreasonably dangerous" product at that time for the purpose of establishing Proctor & Gamble's liability? Under S. 44, recovery for toxic shock under a defective design theory would be denied.

Section 6 of the legislation also eliminates strict liability in failure-to-warn cases and substitutes a negligence standard. Once again, plaintiff (with only limited access to the evidence required) is saddled with the not insubstantial task of proving that the manufacturer knew or should have known about the danger that caused her injury.

In addition, plaintiff must prove that a "reasonably prudent" manufacturer in similar circumstances would have provided a warning. Given the current difficulties involved in persuading physicians to testify against their colleagues in medical malpractice cases, it is unlikely that officials at E.R. Squibb or Hoffmann-LaRoche will be eager to testify against their counterparts at A.H. Robins or Eli Lilly. Thus, although it may appear perfectly sound to invoke the "reasonably prudent" manufacturer as a legal standard, this standard creates practical barriers that will be difficult if not impossible to surmount.

More importantly, although most states currently utilize a negligence type standard in failure-to-warn cases, there are exceptions. In 1982, in *Beshada* v. *Johns-Manville Products*, the New Jersey Supreme Court held that "imposition of liability for failure to warn of damages that were undiscoverable at the time of manufacture will advance the goals and policies sought to be achieved by our strict product liability rules." Imposition of such liability, the court said, would result in (1) risk-spreading, (2) accident avoidance in providing an incentive for the manufacture of safer products and (3) simplified fact-finding or avoiding the complicated, costly, confusing and time-consuming issue of "what could have been known at the time." [*Beshada* v. *Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).] The adoption of S. 100 would immediately reverse *Beshada* and ensure that other jurisdictions do not follow its innovative lead.

Section 6 also provides that in certain circumstances, it is sufficient that warnings be provided to a person other than the claimant. One such circumstance is prescription drugs or medical devices where the manufacturer is required only to warn or instruct the physician. The bill lacks any requirement or even suggestion that the physician pass the warning on to the patient. This appears to eliminate all failure-to-warn suits against drug companies for injuries caused by prescription drugs or devices and reverses the trend toward package insert warnings now required for certain drugs by the FDA. Apparently doctors are assumed to provide the necessary warnings. But, consider your own experience. How often has your own physician warned you of possible side effects or alternative treatment when prescribing a drug? Is it realistic to expect doctors to provide the warnings in lieu of drug companies? Presumably, failure to warn suits could be pursued, it at all, as malpractice actions against prescribing physicians. Malpractice failure-to-warn suits, however, would be more difficult to prove as physician warnings are generally oral, and recollections frequently differ. Product warnings, however, are invariably written. If a doctor fails to warn a patient because the drug company failed to warn the doctor, the injured victim would be left with no remedy whatever. This provision could have a significant impact in preventing or reducing recovery by women in a variety of situations ranging from DES to Bendectin to Depo Provera to Valium—all drugs with potentially dangerous side effects.

Another burden placed on claimants in failure-to-warn cases is the requirement that the plaintiff prove that if the manufacturer had provided warnings "a product user in the course of reasonably anticipated conduct" would have avoided the harm. Under current law, plaintiffs benefit from a presumption that they would have read and heeded an adequate warning or instruction. This provision makes it more likely that the defendant will prevail on the ground that, even though the product lacked an adequate warning, failure to warn did not cause plaintiff's injury, because she would not have read and heeded the warning anyway.

Section 9 of the Kasten bill further inhibits the ability of consumers to recover damages for injury by expanding the manufacturer's affirmative defenses. Essential-

ly, the defendant is not liable if the plaintiff used or altered the product in a manner that was not "expected, ordinary or familiar", even if it was foreseeable. In addition, the plaintiff's contributory negligence or assumption of risk will always reduce and may bar her recovery, whether or not she was aware of the danger or acted reasonably in encountering it.

These defenses would create additional obstacles to plaintiff's recoveries in drug and medical device cases. In such cases—whether the plaintiff has DES-caused cancer, a Dalkon Shield-caused hysterectomy, or has suffered tampon-caused toxic shock—the manufacturer typically alleges that plaintiff's injury was her own fault. For example, defendants often claim that plaintiff should be barred from recovery because she delayed in visiting her doctor or failed to follow doctor's instructions.

The legislation also appears to severely undercut the concept of joint and several liability. Although the language is largely obtuse, 9(a) states that all claims under the act "shall be governed by the principles of comparative responsibility." Section 9(g) refers obliquely to joint and several liability. Since comparative responsibility—assigning a percentage of responsbility for claimant's harm to each claimant, defendant, third-party defendant, and other cause or person—plainly contradicts the concept of joint and several liability, it is unclear to what extent, if any, joint-several liability will survive under S. 100.

Joint and several liability has been of critical importance in recoveries by DES daughters for clear cell cervical or vaginal adenocarcinoma—a hitherto rare disease involving cancerous growth of glandular tissue. Theories of joint and several liability—including concerted action, alternative liability, and enterprise liability—have made it possible for DES daughters to recover against Eli Lilly, the dominant force in the marketing of DES, despite the fact that DES was sold by nearly 150 different drug companies and many DES victims lack positive proof as to which drug company actually supplied the tablets that caused their cancer. Currently women in several jurisdictions have been permitted to recover fully against Lilly under the rationale that an injured party should not be forced to bear the risks simply because she is unable to identify the manufacturer of the tablet her mother was given through no fault of her own. Essentially, courts have decided to overrule traditional proximate cause requirements and hold that, as between an innocent injured victim and a negligent drug company that profited from DES sales, it is more equitable to shift the risk of damages to the drug company. S. 100 appears to override this result, although the language is far from clear.

Another provision of great concern to consumers is, 12, the punitive damage section of the legislation. In an earlier draft, S. 44, the bill limited punitive damage recoveries to one-time per device. This section, proposed by A.H. Robins, would have barred all punitive damage awards subsequent to the first.

After vocal opposition by women's groups and consumer organizations, the Robins one-time-only punitive damage provision was dropped. However, what remains is a punitive damages standard where "clear and convincing proof" is required rather than the usual "preponderance of the evidence." The impact of this substitution would be to sharply curtail the award of punitive damages—one of the strongest forces in deterring the manufacture and sale of unsafe products.

Just last month, Dan Burt, the attorney representing General Westmoreland in his libel suit against CBS, revealed that he decided the case was finished when he saw the judge's jury instructions. According to Burt, four words in the instructions left him no choice. As you may have gathered, the four words were that the jury would need "clear and convincing evidence" from Westmoreland that the 1982 television documentary at issue was false. The charge that never reached the jury read as follows:

"Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence. Clear and convincing proof leaves no substantial doubt in your mind. . . . Clear an convincing proof must be strong and compelling proof, not merely proof that the existing of a fact is more likely than not."

Even under the existing standard, preponderance of evidence, punitive damages are extremely difficult to recover. It must be demonstrated that the manufacturer exhibited reckless disregard for the safety of product users. In S. 100, reckless disregard is defined as "conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by the product." The use of the clear and convincing evidence burden of proof on top of the reckless disregard standard will insure the virtual demise of the common law punitive damages doctrine.

Finally, 12 of the Kasten bill eliminates the jury as the trier of fact with respect to the amount of punitive damages awarded. Instead, if the jury agrees to award punitive damages, the judge, not the jury, determines the amount. In federal courts,

this provision seriously undermines the Seventh Amendment's guarantee of the right to a jury trial in civil suits.

The provisions outlined represent just a few of the serious problems with the Kasten bill. There are scores of anti-consumer measures included in the legislation. It is, without a doubt, a manufacturers' bill.

What we have not touched upon is the fundamental question—should the common law of torts be replaced by legislation? We think not. Although legislation provides predictability, it is far less flexible than the common law. Applying the common law, courts can develop innovative solutions to new problems as society and its technology advance.

Nevertheless, whether you favor the common law or legislation, the Kasten bill would critically undermine recoveries by consumers, in general, and women, in particular, against drug companies. By so doing, it would also send a clear message to drug companies and product manufacturers—there is no need to put extra money and effort into testing and research and development for safety.

STATEMENT OF DR. ROY LITTLEFIELD, EXECUTIVE DIRECTOR, GREATER WASHINGTON/MARYLAND SERVICE STATION ASSOCIATION

My name is Roy Littlefield, executive director of the Greater Washington/Maryland Service Station Association ["GWMSSA"]. GWMSSA is a regional nonprofit trade association representing over 1,000 service station operators located in the District of Columbia and the State of Maryland.

Mr. Chairman I appreciate this opportunity to testify in support of S. 100, legislation to regulate interstate commerce by providing for a uniform product liability law. We contend that such legislation is long overdue.

Product liability law, in essence an outgrowth of the old common law concept of torts or wrongful damage, has become a morass. It has evolved into basically a system of no-fault insurance imposed by the courts upon industry. While lawsuits are ordinarily directed against manufacturers, it is not unusual for wholesalers, distributors and retailers to also be named as defendants.

As the bill sponsor Senator Robert Kasten contends, no area of civil law today is more confusing, more costly, or more counterproductive than product liability law. There exists no reasonable uniform national law. Approximately 30 States have product liability statutes, and no 2 are the same. Whether it be an injured consumer, or a manufacturer or retailer, product liability law is a legal quagmire of 50 different jurisdications with conflicting and ever-changing rules.

The levels of legal activism soar as the disparities become glaringly unjust. Prior testimony before this subcommittee indicated that the number of product liability suits filed nationally in 1974 totalled 1,579. By 1982 the number had risen to 8,944. Certainly anyone wrongfully damaged should have access to the courts. But broad concepts of liability "externalize" the cost of negligence. If someone foolishly abuses a product, for example, why should fellow consumers subsidize his actions? The questions should be what is unreasonable abuse and what is forseeable. S. 100 would "internalize" the costs of torts with stricter limits on liability, which would arise only from unreasonably dangerous construction and design or from a failure to warn of danger or from a failure to live up to an express warranty.

Product liability has unfortunately expanded the litigiousness of American society and has caused some to raise serious concerns of legal ethics. Complex laws and precedents spur lengthy litigation which in many cases leads to exorbitant costs. Studies presented to this committee contend that for every 66 cents consumers attain in liability judgments, lawyers make 77 cents in legal fees.

Consumers ultimately pay the fare for these confusing product liability laws when the ever-increasing liability insurance rates are passed on in the form of higher retail prices. Rates are high because they are set on a national basis and respond to all vagaries and extremes in product liability case law. A single costly court decision could raise insurance rates nationwide. Such a situation is becoming a serious burden on interstate commerce.

Throughout the 1970's product liability insurance rates were established increasingly on a subjective basis. Addressing this reality Congress passed the Risk Retention Act of 1981. That legislation provided product sellers and manufacturers alternatives to commercial product liability insurance through the creation of risk retention or self-insurance groups or through purchasing groups which have the option of buying commercial insurance at favorable rates. The act intended to assure that insurance rates and premiums be set on a fair and equitable basis.

The Risk Retention Act did not address the uncertainty in the outmoded, fragmented product liability tort litigation system. S. 100 would protect the interests of consumers, insurers, manufactures, and product sellers. Manufacturers remain liable if the claimant can establish by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product failed to conform to an express warranty. A product seller is liable only for his own fault—the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of a claimant's harm.

S. 100 stipulates that if a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product after 25 years from the original purchase date. Proper exceptions are made if the claimant's harm was caused by the cumulative effect of prolonged exposure to the product or if the harm did not manifest itself until after the time limitation. Claims for harms which do not manifest themselves until many years after product use are thus excluded from the proposed time limitation on liability.

S. 100 also considers provisions regarding the effect of compliance with government standards on the liability of manufacturers or product sellers from harm caused by a product. A product in compliance with existing standards could be found unreasonably dangerous only if the claimant could produce clear and convincing evidence that the product was unreasonably unsafe and that a safer design was technology feasible and would have complied with all mandatory safety standards.

The product liability reform issue crosses traditional party lines. The Carter administration supported the concept of a Federal statute; the Reagan administration followed suit and endorsed S. 44 in the 98th Congress.

Mr. Chairman, product liability is a growing problem of major concern. A fair and reasonable law should help unclog our courts, promote public safety and reduce consumer costs. S. 100 deserves considerations by the subcommittee. GWMSSA appreciates this opportunity to express its support for S. 100 and we urge prompt consideration.

Statement of the Machinery and Allied Products Institute

The Machinery and Allied Products Institute (MAPI) is pleased to have the opportunity to present this statement on S. 100, the "Product Liability Act," as part of the record of the recent hearing on that measure. In order that the members of the Committee may understand the nature of our interest, and the viewpoint from which we consider this bill, let us say a word about the Institute.

The Machinery and Allied Products Institute is the national organization of manufacturers of capital goods and allied products. In that capacity, MAPI acts as national spokesman for the industries so represented and conducts original research in economics and management. In addition to traditional capital goods product lines, MAPI's constituency includes leading companies in the electronics, precision instrument, telecommunications, computer, office systems, aerospace, and similar high technology industries.

As for products liability, the subject has engaged the Institute's active interest since 1960. We have published extensively in the field and have followed with great interest the very useful work of your Subcommittee in its investigation of a great and growing national problem. We believe that S. 100, the "Product Liability Act," should be enacted promptly. Our reasons for that conclusion are detailed below. In the development of our rationale, we will refer to certain testimony submitted during the hearings.

THE NEED FOR UNIFORM FEDERAL LEGISLATION CONTINUES

We suggest that the prompt enactment of S. 100 is dictated by a need for uniformity in products liability law and as a means to remove or reduce the crushing burden of costs which it has imposed upon the economy.

The need for uniformity.—The Report of the Senate Commerce Committee on S. 44 (Report 98-476, 98th Congress, Second Session, pages 5-6) says:

" . . . a mixture of legal theories, a wide and ever-changing set of common law rules, and fundamental differences about the underlying bases of tort law itself cause uncertainties in product liability law. As a result, the legal standards applicable to a product liability claim are uncertain and unpredictable."

Does this description in measured language of our present system sound like "the carefully crafted law of the states" to which Chief Justice Reynoldson of Iowa refers

in his testimony? [1] From the viewpoint of the nation as a whole, what has been so "carefully crafted" by the courts is total confusion. An attempt was made to achieve nationwide uniformity of products liability law by enactment at the state level of the Model Uniform Act drafted by the Commerce Department. It did not work; of those states which enacted legislation, no two state enactments are the same and the variations are substantial. Uniformity—which is essential—can only be achieved by federal legislation and we believe that S. 100 should be enacted promptly.

The costs of products liability.—Although the total costs of products liability are probably incalculable, they are enormous and the mere identification of principal elements of costs testifies to that enormity. First, and probably most important, is "transaction costs," which in plain English means principally "lawyer costs." Second, there is the cost of products liability insurance which crested at crisis levels in the early 1970s, receded somewhat thereafter, and is now cresting once again. Third, there is the admittedly immeasurable but very real cost of our loss of international competitiveness as American industry shoulders the cost burden of the patchwork, the crazy quilt of differing state law, this thing of "shreds and tatters," which our present products liability system consists of.

Fourth, there is another immeasurable factor of cost which may be the most serious of all—products liability's restraining or inhibiting effect on research and development, and innovation, and its elimination of old as well as new products. (We may not be able to measure this cost, but when products liability—and, "the cynical exploitation of tort law" to quote the Wall Street Journal—so reduces the supply of whooping cough vaccine as to endanger the health and the lives of millions of children, we can be sure there is such a cost.) [2] Clearly, entry into certain product lines is inhibited.

All these costs and some not touched on in this too brief summary, eventually find their way into costs of goods and services. Thus, it is society—you and me—which pays this enormous and continually growing cost of products liability. As for the growth of products liability and its attendant costs, consider some recent statistics.

To begin with, products liability suits have increased in the federal courts. According to this Administrative Office of the U.S. Courts, some 10,745 products liability suits were filed in Fiscal 1984—which ended June 30—compared with 9,221 suits in fiscal 1983. This is an increase of 16.5 percent. By way of comparison, in 1978 only 4,372 products liability suits were filed in the federal courts.[3]

Moreover, the size of court settlements and jury verdicts continues to increase, according to the latest figures offered by the Insurance Information Institute's (III) 1984-85 Property/Casualty Fact Book.[4] From 1974 through 1984, according to III, there was an average *yearly* increase of 12.79 percent in civil lawsuit award sizes. Impressive as that figure is, it is overshadowed by the number of million dollar verdicts which have been awarded since 1962. The number of such awards has risen to a record 251 in 1982 since the first million dollar verdict was reports in 1962. Of the more than 1,000 million dollar or greater verdicts on record, products liability suits account for the largest number, or 26 percent of the total. The Pacific Coast Regional Office of the III has also reported on products liability verdicts awarded in the California Superior Courts. The average 1983 products liability case yielded an award of $939,709, which was 77 percent greater than the 1982 average award of $531,785. Finally, although no statistics exist on defense costs, it seems reasonable to assume that, in the aggregate, they too are enormous and still rising.

THE COMPENSATION PROPOSAL

Section 17 of S. 100 calls for a study of the need for fedeal legislation to help those who may be injured by products concerning which it cannot be proven that the manufacturer should have known of the product's risk at the time it was made or where the manufacturer cannot be identified. Senators Gorton and Dodd have drafted bills which would engraft a "compensation system" onto S. 100 and Senator Danforth, the Chairman of the full Senate Commerce Committee and the author of Section 17 of S. 100, has said, "I would like to see this issue addressed as part of product liability reform now." [5]

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[1] Stenographic Transcript of Proceedings, page 99.
[2] See editorial, "Tort Law's Victims," Wall Street Journal, March 28, 1985.
[3] "Courts Report Rise in Product Liability Suits," *Business Insurance*, October 8, 1984.
[4] As sited in "DRI Defense Law News," *For the Defense*, Defense Research Institute, December, 1984, p. 3.
[5] Stenographic Transcript of Proceedings, page 4.

As Victor Schwartz observed in his testimony, the problem is not a new one, having been identified some eight years ago by the Interagency Task Force on Product Liability. The final report of the Task Force, as quoted by Mr. Schwartz, records the Task Force conclusion that such a no-fault scheme ". . . does not represent an immediate solution to the product liability problem." The report concludes that it would be useful to conduct a further study of this approach and this is, of course, what Section 17 of the present bill would require.[6]

We believe that the conclusions of the Task Force were—and are—correct. Uniform federal products liability—S. 100—is needed badly now. To require that the bill be enlarged to include a supplementary no-fault compensation system can have no other effect than delaying legislation which has been too long delayed already. At best, it will require extensive further Subcommittee study, almost certainly more hearings, and the inevitable dismemberment of S. 100, which is a painfully achieved compromise representing four years of fruitful Committee work. Is all that to be cast aside while we pursue the "siren's song" of no-fault, so often hailed as a panacea, a cure-all, for all the problems of tort law and which has too often turned out to be no solution at all?

All this is especially discouraging when one considers that it comes at the very time that both Chairman Dingell of the House Commerce Committee and Congressman Broyhill, the ranking minority member of that Committee, have announced their support for federal products liability legislation. Once uniform products liability rules are in place and we have had an opportunity to study experience thereunder, it will be timely to consider a no-fault compensation system.

THE OPPOSITION'S ARGUMENTS

In reviewing the testimony of those who oppose S. 100, one notes the recurrence or repetition of certain problems. By way of rebuttal, we have commented below on a number of these recurrent themes.

Strict liability as applied to design defects.—The standards prescribed by S. 100 provide that strict liability shall apply to manufacturing or construction defects and to breaches of express warranties. A negligence or fault standard is made applicable to design defects and failures to warn or instruct.

It seems probable that no provision of S. 100 has evoked more opposition criticism than the second of these standards. Set ot below are some of the comments. Jeffrey Teitz, representing the National Conference of State Legislatures, avers that "During the last two decades, 46 states have adopted a strict liability standard in product liability cases." [7] Michael Williams, a plaintiff's attorney, says:

"The elimination of strict liability for product design defects and failures to warn will deprive many deserving claimants of fair compensation, and will remove a substantial incentive for manufacturers to conduct research and development on safety issues." [8]

Gene Kimmelman, Legislative Director, Consumer Federation of America, asserts that, "The negligence standard as set out in S. 100, would tilt the competitive balance in product liability in favor of manufacturers. Even when negligence is present, it is often difficult if not impossible to prove because manufacturers control evidence about what they knew, when they knew it, and how they responded once they knew. [9]

Before taking up these asseverations, let us look at how it was that strict liability came to be assigned to defects in design and warnings. As this Committee's Report on S. 44 (Report No. 98–476, 98th Congress, Second Session, page 5) says:

The traditional view of strict liability limits the theory to manufacturing or construction defect cases and to breach of express warranty cases.[10]

The report goes on to say "These traditional justifications for strict liability are not present in design and warning defect cases. There is no objective measure for determining if a defect exists. If a particular design or warning is found to be defective, then all the products incorporating or using that design or warning will be defective. Under strict liability, the manufacturer could be responsible for product harms regardless of its care in designing or warning about the product. *Under the law in most States, a manufacturer's liability is based on whether the manufacturer*

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[6] Statement of Victor E. Schwartz, pp. 17–18.
[7] Statement of Jeffrey J. Teitz, page 3.
[8] Statement of Michael L. Williams, pp. 2–3.
[9] Statement of Gene Kimmelman, page 4.
[10] Citing Wade, "On Product 'Design Defects' and Their Actionability," 33 Vanderbilt Law Review, 551 (1980).

acted unreasonably in choosing the product design or in failing to provide an adequate warning about the product." (Underscoring supplied.)

We believe this correctly states the law as it is and, in the nature of the case, must be. Perhaps nothing illustrates so perfectly the absurdity of applying strict liability to the warning defect as the *Beshada* case[11] which held, in brief, that the defendant was liable for failure to warn of the dangerous propensities of asbestos even though it did not know and, at the time in question, could not have known of such dangers.

This is absolute liability and the decision has been widely criticized. The New Jersey court has backed away from its own handiwork and the courts in general have striven to find a way out of the trap which they created by attempting to apply strict liability to design and warning cases in the first place. In thrashing about for firmer ground upon which to base their decisions, the courts have fashioned the "reasonable care" balancing test, the "risk utility" test, and the "consumer expectation" test. Notwithstanding a certain amount of judicial rhetoric asserting that the manufacturer's conduct is not an appropriate issue for consideration,[12] the fact is that fault principles enter into the court's analysis under any one of these tests.

The truth is that the principle of strict liability is simply not applicable to defect and warning cases and the further truth is that opponents of S. 100 denounce the bill's prescription of negligence as the proper standard in such cases because, on its face, it would appear to increase the plaintiff's burden of proof. As we have just pointed out, the increased proof requirement is slight, if any, because as a practical matter, this is what the majority of courts have been requiring right along.

Turning back now to the opposition statements quoted in the paragraph above, the reference to adoption of strict liability by 46 states does not mention the very significant judicial qualifications and limitations just described. Similarly, the charge that the "elimination" of strict liability in defect and warning cases "will deprive many deserving claimants of fair compensation" overlooks the fact that courts in most states have already "eliminated" strict liability in such cases. It will be recalled that Mr. Kimmelman of the Consumer Federation of America charges that S. 100 with its ". . . federal, fault-based scheme" would ". . . wipe[s] out essential consumer protections now embodied in product liability law."[13] The lost "consumer protections" apparently refer to the "fault-based standard" proposed for application to design and warning cases. However, this reference raises by implication a wholly different issue that deserves comment in passing.

Mr. Kimmelman's statement indicates that it is presented on behalf of: Consumer Federation of America, Consumers' Union, Congress Watch, U.S. PIRG.

From this impressive lineup, one may infer that Mr. Kimmelman's appearance and testimony are as a representative of all consumers. Yet, his testimony amounts to an expression of extreme solicitude for those unfortunate consumers injured by products—and who, of course, are entitled to be fairly compensated—but seems to ignore those millions of consumers who pay—and pay—and pay because of price increases generated by our present products liability system and which Mr. Kimmelman apparently thinks is just dandy. Is no one representing all the rest of us consumers on this issue?

Finally, let us consider the assertion that the negligence standard would "tilt the competitive balance" because manufacturers control all the evidence by which negligence can be proven. That is, we think, the weakest of the three arguments because it ignores the use—indeed the abuse—of the legal procedure of discovery by which a plaintiff can use the power of the court to obtain the defendant's most confidential data for use in the preparation of his case.

To sum up, the suggestion that S. 100 proposes some grossly unfair change in the law by applying a negligence standard, rather than strict liability, to design and warning cases is simply wrong. It is wrong because, for all the reasons cited by this Committee in its report on S. 44, strict liability cannot be logically and efficiently applied to such cases. And it is equally wrong because, as a practical matter, courts have spoken of strict liability in judging design and warning cases but their analyses have increasingly tended to consider the defendant's conduct, which is to say, they relied upon a negligence standard.

Diversity of interpretation.—Another favorite line of attack on S. 100 consists of the argument that, to cite one witness, "It is . . . absurd to believe that 56 independent judicial systems, each starting afresh from its own perspective on the law, will

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[11] Beshada v. Johns-Manville Products Corp., 447 A.2d 539 (N.J. 1982).
[12] Lenhardt v. Ford Motor Company, 683 P.2d 1097 (Washington 1984).
[13] Kimmelman, page 2.

reach the same interpretation of such terms as 'proximate cause,' 'otherwise identical units,' and 'economically feasible for use.' " [14]

This conclusion is echoed in the statement of Gene Kimmelman (page 15) to the effect that, "Although S. 100 preempts state laws, state courts would be free to interpret its provisions as they wish, regardless of lower federal court interpretations." In short, this argument says S. 100 will produce confusion compounded. One is tempted to ask these witnesses, "What do they think we have now?"

We think its unnecessary to spend much time on this point because it has already been answered fully by Victor Schwartz. As his testimony (page 4) makes clear, there would be a greater likelihood of achieving ". . . certainly and uniformity in product liability law" because the courts will be applying and interpreting a single statute rather then continuing under the present regime where ". . . courts . . . are guided by no unifying principles or guided by conflicting non-uniform statutes." Even more importantly, says Mr. Schwartz, is the fact that the state courts are not free to interpret S. 100 in any manner they wish, but rather are bound to follow federal court decisions in interpreting the act. His response to this argument is summed up in two sentences (page 5 of his testimony):

"Under the Supremacy Clause of the United States Constitution, state courts are bound to apply federal law.[15] State courts applying federal laws are bound to follow decisions of federal courts."[16]

States' rights.—A third principal argument of those who oppose S. 100 is to the effect that its enactment would be a serious infringement of states' rights. Jeffrey J. Teitz, Chairman of the Rhode Island House Judiciary Committee, appearing on behalf of the National Conference of State Legislatures, said, "We honestly believe the sweeping preemption of state tort law proposed in this bill would fundamentally alter the relationship between the states and the national government." [17] To the same effect is the statement of Chief Justice Reynoldson, ". . . this bill . . . would effectively nationalize the state judicary." [18]

This is a most sensitive area and we share Mr. Teitz' desire to ". . . preserve the vitality of the federal system." [19] It would be preferable if uniformity could be achieved through enactment by the individual states of uniform measure such as the Uniform Commercial Code but, as noted previously in this statement, we have gone down that road already with no useful result and the problem meanwhile has grown worse.

First of all, we have no doubt of congressional authority under the Commerce Cause to enact S. 100. But is this a serious infringement of states' rights? Does it fundmentally alter the federal-state relationship? Does it effectively nationalize the state judiciaries?

We doubt if any one of these charges is to be taken seriously. Would federalization of one part—products liability—of one branch of the law—torts—fundamentally alter the relationship that has swallowed without so much as a hiccough such things as the following? (1) The payment to the states in the form of grants of monies collected by the federal government; (2) a rule which says that an elevator operator in an office building may be engaged in interstate commerce and therefore subject to the Fair Labor Standards Act; (3) the "piggybacking" of state income tax returns on the federal personal income tax returns; and (4) the administration of certain states of federal statutes governing workplace safety. Other examples could be cited, but these will suffice. It is not as if we were discussing the loss of virginity.

Given the present state of the federal-state relationship, as evidenced by these examples, is it really possible that enactment of S. 100 would effect a fundamental alteration thereof? We do not believe it and we do not think the Committee should either.

As for "nationalization" of the state judiciaries, that is simply hyperbole, seller's talk. "States' rights" is a serious argument but in the real world it is just that—an argument—and it does not justify withholding action on badly needed uniform federal products liability legislation.

Punitive damages and the jury.—The treatment of punitive damages by S. 100 is found in Section 12, one aspect of which is of special interest. In brief, it is provided

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[14] Statement of the Conference of Chief Justices on S. 100, the "Product Liability Act."
[15] U.S. Constitution, Article VI, Clause 2.
[16] See. Dice V. Akron, Canton & Youngstown Railroad Co., 342 U.S. 359 (1952) (Federal Employers' Liability Act).
[17] Teitz, page 2.
[18] Stenographic Transcript, page 99.
[19] Teitz, page 2.

by this section that the jury shall determine whether or not punitive damages are to be awarded; ". . . the court shall determine the amount of those damages."

Michael Williams, a plaintiff's lawyer from Eugene, Oregon, testifying on S. 100, has this to say about the punitive damages provision:

"Elimination of the right to trial by jury for punitive damages provides protection to undeserving manufacturers, is undemocratic, and flies in the face of centuries of common law tradition." [20]

Aside from its unwonted extravagance of tone, this statement is at best a half-truth. As for the violation of "centuries of common law tradition," from a recent report, entitled "An International Study of Product Liability Costs and Systems for Five Domestic Machinery Industries." [21] We learn of important "systemic differences" between Europe and the United States, with Europe defined to include the United Kingdom which is, of course, the source of the English common law.

"The use of juries for civil trials is virtually unknown in Europe," the report says at page 222. It then goes on to say, "The only country in which the jury system does operate in civil cases is Ireland (including the counties under British control)." How can centuries of common law tradition be violated if juries for civil trials are virtually unknown in that nation which produced the common law?

The report in question adds this very pertinent point, "It is very interesting to note that Irish juries, like their American counterparts, tend to award much higher damages. Estimates were given that in Ireland, on the average, damages awarded are four to six times as high as in England, even though the standard of living is lower in Ireland."

Nor is that all of the story. "In all of the European countries studied," says the Commerce Department report at page 221, "contingent fees for lawyers are absolutely prohibited." We believe all interested parties are aware that claims for punitive damages are increasing, that juries frequently in response to emotion award damages that do not simply punish, they confiscate,[22] and, finally, that in the case of punitive damages, "transaction costs" are multiplied by the unusual American institution of contingent fees. Section 12 of S. 100 is a very sensible approach to dealing with this Hydra-headed problem and it should remain in the bill.

CONCLUSION

Let us summarize our statement:

1. The need for uniform federal products liability legislation continues.
2. The costs of the present products liability system are intolerable and they are increasing.
3. Development of a "compensation program" deserves further study, but it should not be permitted to delay action on badly needed uniform federal legislation.
4. The draftsmen of S. 100 are correct in logic, in history, and in practicality in calling for application of a negligence standard to alleged design defects and failures to warn.
5. The argument that adoption of S. 100 will produce new confusion in the form of differing interpretations is both erroneous and a red herring.
6. The suggestion that S. 100 would infringe upon states' rights is simply another argument and only that.
7. Elimination of a jury's power to fix the amount of punitive dmages does not "violate centuries of common law tradition," but rather is only a sensible step in the right direction and would bring American practice a little closer to that followed in England.

This legislation would represent an important step toward solution of a serious and steadily enlarging national problem—products liability. We think the Committee should proceed expeditiously to markup and final Committee and floor action. This is especially true in view of Congressman Dingell's pledge ". . . to make my best effort to have such legislation addressed in the House in a timely fashion." [23]

We appreciate this opportunity of commenting on S. 100. If the Institute or its staff can be of any further assistance to the Subcommittee, we hope that you will not hesitate to call upon us.

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[20] Williams, page 7.

[21] Prepared under contract by the American Textile Machinery Association and four other cooperating associations for the U.S. Department of Commerce.

[22] This acknowledgement is not to be construed as any endorsement of punitive damages. We think they should be abolished, but that is another story.

[23] Statement of Congressman John Dingell, page 2.

THE BUSINESS ROUNDTABLE,
Washington, DC, March 20, 1985.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, Washington, DC.

DEAR SENATOR KASTEN: As you know, The Business Roundtable and its task force on product liability have been vitally interested in the progress of federal legislation that would create a uniform product liability system for this nation. Accordingly, we greatly appreciate the opportunity to comment on S. 100, The Product Liability Act, and request that this statement be included in the published record of the hearings before your subcommittee.

The Roundtable's Product Liability Task Force was formed in October of 1981 to help bring about an equitable reform of the product liability tort system. The Task Force, which I chair, consists of the Chief Executive Officers of 12 member companies representing such varied industries as pharmaceutical manufacturers, chemical producers, automobile and diversified machinery manufacturers, as well as wholesale and retail distributors.

When I testified before this subcommittee during the 97th Congress on S. 2631, I stated that the ability of a membership as diverse as ours to build consensus on the complex issues involved in product liability reform is to me compelling evidence of the importance the Roundtable's membership attached to this issue. We did then and we do so even more today as the evidence continues to mount proving that the law is not working.

In 1984, in the Second Session of the 98th Congress, the Roundtable testified again in support of a uniform product liability bill, this time known as S. 44. Although we supported S. 44, as we do S. 100, we noted our disappointment with the bill's failure to give weight to a manufacturer's compliance with government safety standards in product liability actions. Just as the failure of a manufacturer to comply with such standards may be used to prove his negligence, his compliance with them should mitigate his liability.

The Roundtable is also concerned about liability suits against manufacturers of government equipment and the failure of S. 100 to address this issue. When a manufacturer builds products to government specifications, it does not seem fair that it could be sued for damages on the grounds that the product's design, over which the manufacturer did not have final control, is excessively dangerous.

In addition to excluding government safety standards and government contract specifications, S. 100, by the addition of the so-called Stafford amendment (Section 3(c) of the bill), could exclude virtually all chemical products from coverage under the bill. This section sets forth exemptions ostensibly aimed at preserving state environmental laws, but actually going well beyond any such purpose. The chemical industry is no less concerned with this nation's environmental laws and would welcome an opportunity to work with you and your staff to clarify and limit the effect of this provision.

In conclusion, I have enclosed a copy of a *Harvard Business Review* article entitled "Let's Restore Balance to Product Liability Law" which best states the Roundtable's position on product liability reform, as well as a New York Times article by Stuart Taylor, Jr., entitled "Product Liability: The New Morass." I request that these articles be printed as part of the record.

Sincerely,

ROBERT H. MALOTT,
Chairman.

Enclosures.[1]

DEANE, SNOWDON, SHUTLER & GHERARDI,
Washington, DC, March 26, 1985.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation is holding a hearing concerning S. 100, the "Product/Liability Act" (the "Act"). I represent and am writing on behalf of the Auto International Association, a trade association composed of over 300 members,

[1] These are in the Committee files.

including manufacturers, importers and distributors of parts and accessories for imported motor vehicles. We submit this letter as written testimony in support of S. 100 and request that it be included as part of the record of these hearings.

The Association's membership is comprised of small businessmen whose goods enter the U.S. and travel to various states throughout the country. As a result of the present "patchwork" of product liability laws, our members lack a clear understanding of their obligations and defenses. Further, the ever-changing court-made law is increasingly imposing unreasonable burdens upon such manufacturers in terms of liability and denies them reasonable defenses. This confusion and unwarranted liability has, over the past years, forced the Association's members to spend an ever-increasing amount of money in legal fees and for product liability insurance, costs which small businesses can ill-afford and which they must pass along to consumers. In fact, in today's insurance market, many of our members are unable even to find, let alone afford, product liability insurance. In addition, the current system threatens the continued availability of increasingly innovative products and, to an extent, the viability of the manufacturing community. Therefore, we strongly support a unified product liability law.

The Association supports just compensation for injuries and damages caused by wrongful conduct; however, we view the present uneven treatment of innocent importers and distributors as unjustifiably harsh. Senate Bill 100 allows businessmen as well as consumers to be treated on an equal basis. We do not view the Act as ignoring consumers' interests or diminishing their legal rights. Instead, the Act lends clarity and equity to an area that, in recent years, has been without either. Certain groups seem to ignore the fact that the Act imposes safety standards higher than those presently found in many states without adversely affecting the plaintiff's right to sue. In addition, S. 100 will have a beneficial effect on prices, as well as provide an incentive for the creation of new and better products.

The marketplace in our country has become national in scope, and it is, therefore, ineffective for the states to individually address the area of product liability. There is nothing geographically unique in promoting safety, minimizing legal costs and expediting fair and full recovery for wrongfully caused injuries. A national standard is needed to end the confusion and unnecessary costs that continue to plague businessmen.

There is one area regarding S. 100 about which we have reservations. The Assocation believes that too little study and reflection has occurred with regard to the treatment of an importer under S. 100. The Act places the importer in the same category as the manufacturer in many instances. As stated, we support compensation for the wrongfully injured. We believe, however, that it is unfair to hold the importer to the same standards as the manufacturer. Clearly, the importer is functionally much closer to the "product seller" than to the "manufacturer." Yet the importer is being held to a much greater standard of care than the "product seller." The rationale for such a distinction would appear to be that of public policy, that is, that there must be assets available for recovery. We agree. It should be noted, however, that in many instances the "product seller" will be a much "deeper pocket" than an importer. The decision to hold the importer liable is, therefore, not justified by this rationale. We would request that your Subcommittee consider this issue in order to insure the fair treatment of importers.

Auto Internacional Association urges your Committee to report S. 100 favorably and to support its passage through the Senate. We must recommend, however, that the issue of importer liability be studied further.

Sincerely,

STEVEN T. MILLER.

AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION,
Lanham, MD, April 4, 1985.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer,
Washington, DC.

DEAR SENATOR KASTEN: The Automotive Parts and Accessories Association submits the following comments on S 100, the Product Liability Act, for the March 21 hearing record.

APAA strongly supports S 100 as a sound and balanced solution to our product liability problems. We find it reprehensible that the current tangle of state laws and court cases which currently govern product liability law is allowed to continue. Such a system inhibits interstate commerce and prevents consumers, manufacturers and

sellers of products from clearly understanding their rights and responsibilities under the law.

Mr. Chairman, the committee now has an opportunity to determine the direction of the nation's tort system. I think it is clear that the current system of product liability law is antiquated and is not placing responsibility for damages caused by products on the responsible party. Rather, the current system punishes both the guilty and the innocent, causes confusion for both parties and ultimately penalizes consumers in higher product prices and legal fees. The prime culprits in this spider's web are the myriad of state laws and the courts' reliance on strict liability in determining responsibility.

The state by state and court by court inequities in the system mean that injured consumers' rights to sue vary by jurisdiction. Similarly, product manufacturers' responsibilities under the law are different in every state and court. The result is a system where product liability suits involving the same product and similar circumstances can have different outcomes depending on where they are heard. The cost of this confusion is built into product liability insurance premiums and into legal fees charged to both defendants and plaintiffs. Manufacturers face higher costs to design products that comply with differing standards. And, of course, all of these costs are passed on to American consumers who pay higher prices.

The system's inequities are exacerbated by a pronounced favoritism towards consumers. Spawned by years of a laissez-faire mentality where the law made it difficult for consumers to sue product manufacturers for damages, the pendulum has now swung the other direction and overprotects product buyers. The concept of strict liability, expanded since the early 1970's, now seemingly imposes on manufacturers the sole responsibility for injuries caused by their products, with little if any regard for mitigating factors.

Working in tandem with strict liability is the "deep pocket theory." Common sense might tell you that if the consumer is at fault then he or she should pay. However, as trial lawyers know, despite overwhelming evidence of improper use or negligence on the part of the user, the manufacturer will get saddled with the punishment because the court, or jury, feels that the manufacturer's assets are greater than the injured party's.

Many trial lawyers contend that the present tort system is not at fault. Rather, they argue that it is a producer's responsibility either to make a product which takes into account all conceivable dangers, or not produce at all. As far fetched as this may seem, the trend of the present standard of strict liability and the deep pocket theory are moving us in that direction.

The current system cuts at the very heart of America's free marketplace, where consumers vote with their dollars for the type and quantity of goods they want produced. It is confusion over product liability, not market forces, that dictate production plans and skew prices to cover unknown costs and risks of product liability litigation and esculating premiums set under uncertainty by insurers. The system also ignores the fact that products made in one state are bought and sold in every state of the Union. Continuing the present tort system will assure increases in product liability costs to companies and consumers alike. Only trial lawyers stand to gain from increased legal fees.

WE THINK IT IS TIME FOR A CHANGE!

S 100 strikes a compromise between the rights of consumers and manufacturers, a balance with which our members can live. Companies would be held liable for injuries or damages if the product is unreasonably dangerous in design or construction; lacked adequate warning; or did not conform to an express warranty. The consumer would accept responsibility if the product was not used properly; improperly modified; or if he or she knew of the dangers. Most important is that these would be uniform national standards. This comprehensive reform not only would place accountability where it belongs, but would bring outmoded tort systems into the age of interstate commerce.

Thank you again for this opportunity to state our position on S 100 and to comment on the distressing state of the current tort system. Attached are a series of proposals which we feel would enhance the bill's effectiveness.

Sincerely,

JULIAN C. MORRIS,
President.

Enclosures.

PROPOSED CHANGES TO S. 100

1. A statute of repose which runs 10 years from the date of manufacture. In states with no statute of repose, manufacturers and sellers of allegedly defective products often are confronted with liability for supposed defects which are due not to defective manufacturing, but rather to the length of time the product has been used, and ordinary wear. The manufacturer should have limited time of liability exposure except in express warranty situations and in other cases, such as drugs, where the effects could take years to become apparent.

S 100 currently contains a 25 year time limitation on liability, limited to capital goods. But, there is no statute of repose for motor vehicles, parts, accessories and other consumer products. This omission deeply troubles our members. While APAA recognizes this is both a controversial and emotional issue, we feel that the effectiveness of the bill is significantly dissipated by the failure to include a statute of repose for consumer products and to cover commercial vehicles under the capital goods statute.

Many states have a statute of repose on consumer goods, but they vary in length from state to state. Failure to set a uniform standard will deny insurance companies the predictability of exposure they need to set rates. And, overly restrictive time limitations will continue to prevent consumers from suing in some states. In addressing this problems, Congress should be guided by the purpose of S 100: to unify the law in the interest of better interstate commerce and legal simplicity.

APAA proposes the inclusion of a ten year statute of limitations on motor vehicles, parts, accessories, and other consumer products. Consumer protection would not suffer, as the average age of cars on the road is 6.8 years and most auto parts defects appear in the first two years. Indeed, the Interagency Task Force on Product Liability concluded that most defects in consumer goods appear within the first 10 years.

2. Limitations on contingency fees for attorneys in product liability cases, and a call for reasonable awards with limitations on on-economic losses such as pain and suffering, loss of personal services, and punitive damages. In most jurisdictions, there is no limitation on the amount of contingency fees received by attorneys in product liability cases. Many lawyers will take cases on a contingency basis and only charge the client a percentage if he wins. Coupled with the courts' bias towards the injured, this has caused an undue increase in the number of suits filed.

We understand that contingency fees give people who could not otherwise afford to sue, the opportunity to do so. But, we feel that some contingency fee limits would help curtail the number of frivolous suits brought against manufacturers, and in so doing help restore some reasonableness to product liability litigation.

There is no limit on contingency fees in S 100. We recommend that one be added.

We also recommend a limit on so-called "non-economic losses" such as pain and suffering. Since these involve highly subjective judgments, juries understandably are swayed by a man in a wheel chair, even though he may be responsible for his own injury.

Punitive damages are limited in the bill to cases where there was a reckless disregard for the safety of the product user. We concur. The bill also sets specific guidelines for seeking punitive damages when appropriate. APAA feels that these guidelines will help limit punitive damages to deserving claimants and to reasonable amounts.

3. Include compliance with federal government standards as a rebuttable defense. This would help juries to judge whether a product was safely manufactured. Such a provision would have the added advantage of encouraging compliance with federal safety standards.

In conclusion, we commend Senator Kasten and the Committee for their dedication to developing legislation which strikes a balance between both industry and consumer interests.

Over the past several years this legislation has undergone a thorough review. The extensive debate has produced many changes designed to meet the concerns raised by many groups. We believe this process has made S 100 a better bill.

The legislative process has worked, and it is time to give the full House and Senate a chance to act. While we propose further improvements, APAA also urges all Members of Congress to oppose any erosion of the bill's provisions. It is time to enact S 100, and bring badly needed reform to product liability litigation.

Statement of National Printing Equipment and Supply Association, Inc.

I. INTRODUCTION

The National Printing Equipment and Supply Association, Inc. (NPES) is a national trade association whose member companies are engaged, within the United States, in building, manufacturing, repairing, selling, importing for sale or distributing machinery, equipment and supplies used in the Graphic Arts Industry. Together with associate members (such as trade publications and firms offering related graphic arts services), NPES membership currently stands at approximately 230 companies which account for about 90% of domestic production of graphic arts equipment and supplies.

NPES welcomes and appreciates this opportunity to appear before this Subcommittee to address the crisis in product liability law which today confronts our industry specifically, and our economy more generally. Although this is the first time that NPES has filed testimony with this Subcommittee, the members of our Industry and Association are certainly no strangers to the burdens imposed by the confused and confusing state of product liability law in the United States today.

We are also not unaware of your tireless efforts, Mr. Chairman, in trying to bring stability and equality to this volatile area of the law. We, therefore, commend your efforts and those of a number of your colleagues who have patiently persisted in shaping balanced and effective uniform product liability legislation, often in the face of hyperbole and opposition from groups whose narrow financial self-interests are served at the price of inhibiting the competitiveness of U.S. made products in the marketplace, and at the ultimate expense of the American consumer.

The overwhelming approval of last year's legislation, S.44, by the full Commerce Committee is evidence of the extremely broad-based support garnered for a bill which has been thoughtfully and responsively shaped by the legislative process over the course of nearly a decade of study and analysis of the nationwide impact of the product liability problem. Your swift re-introduction of S.100 in this Congress encourages us that 1985 can be the year in which ten years of effort will come to fruition in the enactment of uniform product liability law, which will address a problem which becomes increasingly more serious for manufacturers and consumers each year.

II. AN OVERVIEW OF THE PRINTING EQUIPMENT AND SUPPLY INDUSTRY AND THE NATIONWIDE CRISIS IN PRODUCT LIABILITY WHICH IT FACES

A. The Interstate Character of the Problem

A brief overview of the Printing Equipment and Supply Industry will serve to put in perspective the nationwide crisis it currently faces in product liability. Companies in the Printing Equipment and Supply Industry range in size from those with annual sales of less than a million dollars to those with hundreds of millions of dollars of revenue. The equipment manufactured by this industry runs the gamut from phototypesetters, color scanners, and prepress machinery to sheetfed and web presses, dryers, and bindery units. Products offered by the supply side of the industry include photo-mechanical film, chemicals, printing plates, and other working materials. Taken together, these products and related services represent an industry worth over $3 billion.

Focusing more narrowly on the printing trades machinery sector of the industry reveals that as of 1984 there were 568 establishments manufacturing this type of equipment in the United States.[1] Although these manufacturers are only a portion of the total industry, surveys indicate that they are the companies most greatly impacted by product liabilty claims stemming from traumatic injuries involving their products. Of these establishments, 63% employ fewer than 20 people. And, as of 1984 production worker employment in the printing trades machinery industry stood at 14,200.[2]

In stark contrast to the relatively small printing equipment machinery industry, its domestic customer, the U.S. Printing and Publishing Industry, consists of more than 53,000 establishments which employ 1.3 million workers.[3] With this dramatic

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[1] U.S. Department of Commerce, "U.S. Industrial Outlook 1985" (Washington, D.C.: Government Printing Office , 1984), p. 23-15.

[2] *Id.*

[3] *Id.* at 27-1.

difference in mind, it is obvious that the industry should have great concerns about the development of product liability law, particularly as it defines the rights, responsibilities, and liabilites of manufactures, workers, and employers as they come together in the workplace setting. We, therefore, support the legislation's effort to clarify the relationship between the Workers' Compensation and product liability tort systems, which inevitably come together whenever product-related injuries occur in the marketplace. We believe that section 10 of the bill forthrightly addresses this conflict with provisions which keep the two systems separate, minimize legal costs, and promote safety. We will discuss this section in more detail later.

Printing equipment manufacturers' exposure to product liability claims stemming from workplace accidents is magnified a hundred fold as their equipment is distributed throughout the country for use by newspapers, commercial printers and many other smaller users in nearly every city in every state of the nation. Therefore, printing equipment manufacturers, as most other producers of capital goods, are clearly involved in interstate commerce. Unfortunately, they also typically find themselves potentially subject to product liability law suits in every jurisdiction in the country, under 51 varying sets of rules, that often at best are in consistent, and sometimes are in direct conflict.

Because products are distributed nationwide, instability and conflict in this area of the law is a formidable impediment to interstate commerce. Although a manufacturer may have facilities in only one of several states, his products may be, and often are sold to users in many states. And while manufacturers who market their equipment directly have some control over and knowledge of the location of their products, those who sell their products through independent distributors lose control over the sale of products to their ultimate users, and, therefore, usually have no practical way of keeping track of their whereabouts. Moreover, this does not even begin to take into account the situation where machines are sold by one user to another, often with attendant makeshift modifications which completely alter the basic nature of the equipment, with the new owner employing the jerryrigged machine for a use completely unintended and unforeseeable by the original manufacturer.

B. Product Liability Insurance Premiums Are Increasing in the Wake of Record Underwriting Losses and Reduced Investment Income for the Insurance Industry

In 1977, the Federal Interagency Task Force on product liability identified ratemaking procedures of liability insurers as one principal cause of the product liability problem. The task force concluded that the rate increases, which contributed and brought attention to the product liability problem, were overly subjective.[4]

Thanks to your leadership Mr. Chairman, this aspect of the problem was addressed by the passage of the Risk Retention Act of 1981.[5] Designed to ensure that product liability insurance rates accurately reflect the true risk in the system, the Act provides for additional competition in the market by facilitating cooperatives, known as Risk Retention Groups, and the purchase of product liability insurance on a group basis.[6]

The ability of companies to self-insure or to obtain lower premiums on a group basis has helped alleviate the subjectiveness of insurance ratemaking, but it is not a guarantee that premiums will remain low. Whereas risk retention addressed the accuracy of product liability insurance rates, market forces influence the level of those rates.

As the Committee knows, insurance premiums skyrocketed during the late 1970's, peaking in 1979, with some manufacturers unable to obtain coverage at any price. From that time until very recently, premiums moderated, with unavailability generally not a problem. This was largely the result of high interest rates which resulted in large investment profits for insurance underwriters. These huge profits served to offset heavy underwriting losses during these years, and to some degree masked the true cost of liability coverage during this period. However, also during this period, insurance industry sources warned that the combination of these record losses with reduced interest rates would eventually result in an increase in product liability insurance premiums. That result is now being manifested in dramatic increases in premiums from just last year to this year, as insurers attempt to protect themselves in the changed economic environment of lower interest rates.

Following on this analysis, some apparently argue that the market dynamic of underwriter investment income is the sole variable accounting for recently increased

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[4] Senate Rep. No. 98-476, 98th Congress, 2nd Session, (1984), at 6.
[5] Pub. L. No. 97-45, 95 Stat. 949 (1981).
[6] *Id.* at 3.

insurance premiums, with instability and uncertainty in product liability law having little or no bearing on the cost of coverage. In response to this postion we would suggest that heavy underwriting losses and ever-expanding theories of manufacturer liability are indeed significant variables which surely do influence insurance premium rates, and cannot be discounted in the calculus of the market equation.

To carry the metaphor further, it is indeed the costliness (both in terms of judgments and transaction costs), and the unpredictability of product liability law which is the denominator that defines the adequacy, the numerator as it were, of underwriter investment income.

Although proving direct causation in such situations is an inexact science, we believe that it is impossible to escape the conclusion that uncertainty and instability in product liability law has a dramatic effect on the level of insurance premiums.

III. S. 100 WILL ADDRESS THE PROBLEM OF UNCERTAINTIES IN THE PRODUCT LIABILITY TORT LITIGATION SYSTEM

A. Sources of Uncertainty in Product Liability Law

In its report on S. 44 this Committee last year identified three inter-related factors which contribute to the current uncertainties of product liability law: (1) the common law state-by-state evolution of product liability law; (2) the evolution of product liability law from both contract and tort law theories; and (3) conflicting philosophies regarding the underlying purpose of tort law. At this point we will address each of the above three points and examine how the provisions of S. 100 help to resolve the uncertainties caused thereby.

B. States Cannot Effectively Resolve the Uncertainties in Product Liability Law

Historically, product liability tort law has developed as judge-made law at the state level. Inherent in this process is the tendency for variations to occur from state to state, and within individual states over time as changes in judicial personnel and jurisprudential thinking occur. While there may be certain advantages to the common law evolution of some areas of law within individual jurisdictions, these advantages are far outweighed by the chaos such a patchwork of varying rules imposes on modern interstate commerce such as is found in the sale of capital goods. Even the framers of the United States Constitution nearly two hundred years ago could foresee that certain aspects of intercourse between the states could not be effectively facilitated by a menagerie of different state laws, but would be more efficiently and equitable governed by consistent federal guidelines, hence the Commerce [7] and Supremacy [8] Clauses of the U.S. Constitution.

Another result of confusing and conflicting laws in this area is the increase in litigation expense which it fosters. Lawyers for both plaintiffs and defendants must spend more time and effort researching and briefing the applicable legal rules. Moreover, the lack of clear and consistent rules impedes efforts to settle cases, and encourages people to pursue costly legal claims, in which the only real winners are the attorneys.

For example, according to a 1977 Insurance Service Office Survey, "For every dollar paid to claimants, insurers paid an average of 42 cents in defense costs. And for every dollar awarded to a claimant, the claimant pays an average contingent fee of 33 cents in legal costs, leaving he or she with only about 62%." [9] Adding these two numbers together it appears that the product liability tort litigation system costs more in litigation and transaction costs than the net recovery received by the claimant.[10]

A uniform product liability law would substantially reduce litigation costs, because statuatory rules of liability would remove the incentive to litigate every case in the hope of obtaining a novel decision expanding the liability of manufactures.

Of course, some have suggested that uniformity could be achieved by drafing a uniform model law which could then be adopted by each of the states. This approach was taken with regard to the model law known as the Uniform Product Liability Act (UPLA) (The product of the Federal Interagency Task Force on Product Liability), which was published in October 1979. Originally drafted as a model uniform product liability law to be enacted at the federal level, UPLA ultimately was offered as a model state law.[11] While over 30 states have adopted some form of

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[7] U.S. Constitution Acticle I, Section 8, Clause 3.
[8] U.S. Constitution Acticle VI, Clause 2.
[9] S. Rep. 98-476, *supra*, at 6.
[10] *Id.*
[11] *Id.*, at 4.

product liability statute, no single state has adopted the model law in full. Unfortunately, the statutes adopted by most states are not comprehensive and fail to adequately address the key issues that arise in product liability litigation.

The continuing confusion among the states is evidence of this fact. For example, this Committee in its report on S. 44 identified a number of areas, ranging from rules governing the admissibility of evidence, to basic issues such as the standard for determining liability, where there continues to be tension, if not direct conflict between the states. Moreover, a product liability statute by any single state inevitably will continue to be interpreted and applied in light of that state's common law background in the area of products liability tort law.

In contrast, S. 100 will provide a uniform standard which will guide both federal and state judges in each jurisdiction. Although some have argued that relegating cases arising under the federal statue to state courts allows each state to interpret the law in its own way, we believe that the authority of the Supremacy Clause of the Constitution, by which state courts are bound to apply federal law, will effectively prohibit circumvention and distortion of the federal statue by state or federal court judges.

There is ample precedent to insure that state courts applying federal laws are bound to follow decisions of the federal courts.[12] Additionally, when there is a variance between state and federal law, "incompatible doctrines of local law must give way to principals of federal . . . law." [13] And conversely, federal courts are not bound by decisions of a state court interpreting federal law.[14]

Even if there is some diversity of views regarding the interpretation of some parts of the new statute, there will be a substantial body of definitive judicial opinion to help ensure the uniform application of the federal statute.

Additionally, every court applying the federal Product Liability Act will begin from a common statutory text employing common, easily understood terms and familiar principles. Any unlikely potential ambiguities in the language of the statute can be resolved readily by reference to the comprehensive legislative history which to date has evolved during the last 8-year period before numerous congressional committees over the course of four congresses and administrations.

C. S. 100 Simplifies and Clarifies the Law by Creating One Unified Product Liability Cause of Action

A second cause for much of the uncertainty in this area is the fact that product liability law has evolved from both contract law and tort law theories, such as negligence, strict liability, misrepresentation, and fraud on the tort side, and breach of warranty on the contract side.

In response to this problem, section 3 of S. 100 simplifies the law by providing that the Act governs any civil action against a manufacturer or product seller for loss or damage caused by a product. This section merges all current product liability legal theories and creates one unified product liability cause of action, thereby eliminating the multiplicity of theories referred to above. Additionally, in response to the concerns of Senator Stafford and others interested in environmental issues, a provision has been added that specifically exempts state environmental laws from the scope of the proposed legislation. While the preemption provision of Section 3 ensures that the rules set forth in the act are uniformly applied in all product liability actions, it specifically avoids creating any new basis for federal court jurisdiction, which could potentially overburden the federal courts with this type of litigation.

D. S. 100 Adopts the Majority View that Fault Should be the Basis of Liability in Product Liability Cases

The third factor contributing to the uncertainties of product liability law is the basic difference in philosophies about what the goal of tort law should be with regard to product-related injuries. These differing perspectives are best illustrated by the standards of liability employed in various types of factual settings. For example, traditionally the theory of strict liability has been limited to cases involving manufacturing or construction defects, or to breach of express warranty cases. The theory is justified in these cases on the basis that it is reasonable for consumers to

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[12] *Dice* v. *Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359 (1952) (Federal Employee Liability Act).

[13] *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Floor Company*, 369 U.S. 95, 102 (1962) (National Labor Relations Act).

[14] *Bryand* v. *Civiletti*, 663 F. 2d 286 (D. C. Cir. 1981); *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981).

expect that a product will conform to its manufacturer's own standards and/or representations.

Senate Bill 100 in sections 5(a) and 7 respectively, adopts this standard by specifying that a manufacturer is strictly liable for harms caused by a defect in the manufacture or construction of a product, or for harms caused by a product's failure to meet an express promise that relates to safety.

Strict liability works well in these cases because, whereas it may be difficult for a plaintiff to prove how in the manufacturing process the defect occurred, it is quite simple for a jury to make an objective comparison between the product the manufacturer was attempting to produce and the product that caused the claimant's injury. Likewise, in express warranty cases it is usually relatively easy for a jury to measure whether a product lived up to the performance expressly warranted by the manufacturer.

This standard, as it would be applied in manufacturing defect cases, is actually more favorable to claimants than the law in most states, because most states require that the claimant prove that the manufacturing flaw was "unreasonably dangerous" as a prerequisite to imposing liability. It is also more favorable to claimants than the laws of most states in express warranty cases where it is usually required that the claimant prove that he relied on the words of the warranty.

Turning to cases involving injuries stemming from design or warning defects, S. 100 adopts a fault-based standard, which, notwithstanding assertions to the contrary, is the effective rule of law in both types of cases in most jurisdictions today.

Section 5(b) of the Bill specifies that a manufacturer is liable for harms caused by a product's design if: (1) he knew or, by exercising the care, attention, knowledge, intelligence, and judgment that society requires, should have known of the danger in the product's design; and (2) a reasonably prudent person in this circumstance would not have used that design. This is a rigorous, yet flexible standard that holds manufacturers to a high level of accountability, while at the same time allowing for technological innovation.

As noted above, opponents of S. 100 have erroneously characterized this standard as an anti-consumer retrenchment from what they assert is the majority rule of strict liability in such cases. While there are a variety of design liability standards, some of which are labeled "strict liability," the tests are, in fact, no more rigorous than the standard in S. 100, and in some cases are actually less demanding. More importantly, all of the tests, in one way or another, in fact use a fault-based analysis. This reflects the reality that conceptually evaluating the design of a product cannot be divorced from assessing the conduct of the manufacturer who produced it.

Likewise, with respect to failure to warn cases, S. 100 adopts the majority view which, regardless of the label, is a fault-based test focusing on the manufacturer's conduct in warning about his product. Specifically, Section 6 of S. 100 states that a manufacturer is liable for harms caused by the failure of the manufacturer to provide a warning about the product's dangers if: (1) the manufacturer knew or, by exercising the care, attention, knowledge, intelligence, and judgment that society requires, should have known of the danger in the product; (2) he failed to provide the warnings that a reasonably prudent person in the same circumstance would have provided; and (3) the warnings would have prevented harm to a product user.

This formulation requires the manufacturer to use the most rigorous care in warning about a product, and it holds him liable for harm which results when he fails to do so.

IV. S. 100 CLARIFIES AND BALANCES THE RIGHTS AND RESPONSIBILITIES OF PLAINTIFFS AND DEFENDANTS

As noted above, opponents of S. 100 continue to characterize the legislation as an anti-consumer measure. However, in reality, the Bill takes a mid-ground position, eliminating unfairness in the law on both sides of a case. It both unifies and makes more reasonable the rules by which a manufacturer's duty of care is measured, as well as correcting some aspects of current law that are unfair to claimants.

The following sets of facts from two recent cases involving one of our Illinois members will serve to illustrate the equity of the provisions of S. 100.

A. Case No. 1

In case No. 1, an Illinois manufacturer is being sued in the state of Massachusetts for an injury which allegedly occurred in the course of the operation of a printing press manufactured by the defendant in 1914, which had subsequently been substantially modified and coverted into a cardboard cutter and creaser.

Although the defendant manufacturer may be successful in its defense, it is, nevertheless, incurring substantial costs in defending this action involving a 68-year-old product that was being grossly misused at the time of the incident.

1. Time Limitation on Liability

The facts of the above case highlight the plight of manufacturers who produce capital goods which have long, if not indefinite, use in the industrial workplace. As the report on last year's legislation (S. 44) recognized, "although a manufacturer or product seller is responsible for dramatically fewer claims as a product gets older, claims may be made for a period of time well beyond the real life of the product." [15]

This open-ended form of liability—the so-called "Long Tail" of liability,[16] has been addressed in Section 11 of S. 100 which specifies that actions for harms allegedly caused by a defect in the design or warning of a capital good must be brought within 25 years of the time the product was first delivered unless: (1) there was fraud or intentional misrepresentation by the manufacturer or product seller; (2) the harm was the result of the commulative effect of prolonged exposure to a defective product; or (3) the harm was caused within the 25-year period, but did not manifest itself until after the period expired, as in the case of a latent harm.

We fully support the purpose of this section, sometimes referred to as the statute of repose, which is to provide some point after which legal claims can no longer be filed. According to last year's report, data shows that "over 87.6% of payments for injuries caused by defective capital goods are paid within 12 years of the time the product was made."[17] Yet manufacturers, such as the defendant in our case #1 above, are forced to defend these suits involving overaged equipment time and again, even though the claimants are rarely successful.

The 25-year cutoff established by Section 11 of S. 100 is meaningful in that it establishes a definite guideline by which to judge the action. By the same token, it has been argued that the period is long enough to afford adequate opportunity for claimants to litigate suits for product-related harms. Moreover, by limiting its application to design defect or failure to warn cases involving capital goods[18] used in the workplace, the section helps assure that claimants have a remedy when they are injured on very old machines—specifically, workers compensation.

2. Statute of Limitations

On a related point, Section 14 of S. 100 specifies that a claim may be brought any time within two years after the claimant discovers or should have discovered his harm and its cause. By contrast, under most states' statutes of limitation the period in which a claimant must file his action begins to run at the "time of injury." While such a rule poses no issue in cases of traumatic injuries which are immediately

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[15] S. Rep. 98-476, *supra*, at 52.

[16] One recent commentator described this problem as follows: First, it may be difficult to "cost in" tort liability over a period of 10, 20, 30 or more years, given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied. Second, the manufacturers most consistently exposed to these risks are those producing capital goods, such as industrial machinery. These manufacturers sell relatively few products, and, therefore, may be less able to "pass through" the costs in the price of new machines. Third, if they do attempt to pass the costs through to customers, older producers, with liability exposure from units already in place, would be at a substantial competitive disadvantage compared to new entrants into the market. Fourth, regardless of what the law may be, there are substantial risks in trying cases involving older products. For example, there is a greater chance that the product has been subjected to a modification or misuse that the jury will say the manufacturer should have foreseen; there is also an increased risk that the jury, no matter how instructed will use a hindsight perspective rather than evaluate the product by the state of the art at the time it was produced.

Finally, even if a manufacturer of an older product is able to prevail on the merits at trial, the investigation and processing of claims is an expensive procedure, and the expense is greater when withesses and records are difficult to obtain or have long since disappeared. Martin, "A stature of repose for product liability claims," 50 Fordham L. Rev. 745, 749 (1982), as cited at S. Rep. 98-476, *Supra*, at 52.

[17] S. Rep. 98-476, *Supra*, at 53, citing "Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results." 230, 414 (1977).

[18] As defined in S. Rep. 98-476, *Supra*, at 53, a "Capital Good" is any product or component part of any product, other than a motor vehicle, or a vessel, aircraft, or railroad used primarily to transport passengers, which is depreciable under the Internal Revenue Code and: (1) used in a trade or business; or (2) held for production of income; or (3) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for similar purposes.

Vehicles referred to in the above paragraph are not included in the definition, and therefore, product liability actions including such products are not subject to the time limitation in Section 11.

known, it may have unfair effects in cases of latent injuries. S. 100's "discovery type" rule is, therefore, a benefit to many consumers who under many states' law would be out of court before they had discovered their harm, and the cause thereof. This is but one example of how consumers' rights are enhanced under S. 100.

B. Case No. 2

In another recent case the same Illinois company referred to above was forced to settle a case arising in New Jersey because of limitations to introducing the plaintiff's own negligence in the accident. This case involved a worker who opened an access door and reached in to adjust the power transmission belt of a small printing press while it was still running and was injured by adjacent parts of the machine. The on/off switch for the machine was within arm's length.

1. Pure Comparative Responsibility

In contrast to the result in the above case, Section 9 of S. 100 would have permitted the introduction in evidence of the plaintiff's own negligent actions for the jury to consider in evaluating liability in the accident. This provision adopts a rule of "pure" comparative responsibility which permits a claimant to recover damages even if his or her own conduct contributed substantially to the harm.

Under current law a few states adhere to the "all or nothing" contributory negligence rule that totally bars recovery if the claimant's fault in any way contributes to his harm. However, most states have rejected this approach as unfair to the claimant. Rather, the majority view is that of "modified comparative" responsibility, which generally allows the claimant to recover if his conduct was less than 50% the cause of the harm. In this regard, S. 100 adopts the pro-claimant rule that is the modern trend in the law. It is also another example of a provision which has been ignored ty the detractors of S. 100.

As manufacturers we might be expected to object to a rule that "favors plaintiffs". However, we support the basis of Section 9, which promotes safety by adhering to the concept of individual responsibility. Section 9 ensures that a defendant will be responsible for only the proportion of damages he causes, and that a claimant will not be totally barred from recovery because his own conduct was a factor in the injury.

Two other specific provisions of Section 9 are particularly helpful in focusing attention on the principle of the proper allocation of individual responsibility for misconduct. Section 9(c) provides that misuse of a product by a person, other than the claimant's employer or co-employee (the rationale for this exclusion will be discussed below), is considered in allocating responsibility for the claimant's harm. Adopting the definition found in the Restatement (Second) of Torts, the bill states that misuse occurs when a product is used for a purpose or in a manner that is not consistent with the reasonably anticipated conduct of users, that is, conduct that is not consistent with conduct which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product.

Additionally, last year's report points out that misuse may include use that is inconsistent with adequate warnings or instructions regarding the product. This is based on the principle that a manufacturer or product seller has the right to assume that its adequate warnings or instructions will be followed.[19] We support this view.

Finally, since many workplace injuries result from accidents due to improper or inadequate instruction of equipment operators, we strongly support and commend S. 100 for recognizing as a form of misuse the failure to train another perosn or otherwise provide for safe use of the product by one who would reasonably be expected to train others or to provide for safe use of this product.[20]

2. The Interaction of the Law of Product Liability and the Workers' Compensation System

The industrial workplace is, of course, the basic context in which the law of products liability operates with respect to the products manufactured by our members. Section 10 of S. 100 clarifies the interaction between the product liability system and the Workers' Compensation System with rules that keep them separate, minimize legal cost, and promote safety.

Currently, the tort litigation system is plagued with efforts by workers, employers, and product manufacturers to shift product liability and Workers' Compensation costs among and between the involved parties. Section 10 minimizes the litiga-

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[19] S. Rep. 98-476, *Supra*, at 45.
[20] *Id.*

tion expense of such cost shifting by provising that any damages awarded in a product liability action shall be reduced by the amount paid or to be paid the claimant under any state or federal workers' compensation law.

Under Section 10(a) the claimant's total damages, as determined under Section 9(b)(1)(A), are reduced by the amount of workers' compensation benefits the claimant is entitled to receive. The defendant's percentage of responsibility, as determined under Section 9(b)(1)(B), is then applied to the remaining amount, and a judgment entered against the defendant in that amount.

NPES supports this approach which eliminates rights of subrogation, contribution, or indemnity between employers and manufacturers and the legal costs associated therewith, while at the same time ensuring that injured employees recover the full amount of workers' compensation benefits and any product liability judgments which may have been awarded. The combination of Sections 9 and 10 maintains the integrity of the Workers' Compensation System, while allocating damages as accurately as possible on the basis of proportional responsibility for the harm.

Finally, Section 10(d) ensures that nothing in the bill prohibits employees from sueing their employers for harms caused by purposeful acts such as assault, battery, trespass, or false imprisonment, if the law of the particular state permits such suits.

V. CONCLUSION

The crisis in product liability law is not a myth. It persists despite the efforts of numerous state legislatures to address the issue on a state-by-state basis. Nor are spiraling product liability insurance premiums simply a reflection of declining investment income for underwriters. Judgments stemming from ever-expanding theories of liability, and the transaction costs of the litigation that spawns such theories, do influence insurance premium pricing decisions.

The interstate nature of modern product distribution demands a federal solution to the nation-wide product liability crisis. S. 100, we believe, is the solution to this problem. As we have discussed above, the legislation provides guidance for all jurisdictions throughout the country. In many respects the bill follows majority rules of law that are well-entrenched. And where it departs from majority rules of law, there are valid public policy reasons for doing so, such as the promotion of safety and the reduction of legal fees.

Once again, we commend this Committee for addressing this subject early in this new session of Congress. And we would urge you to favorably report S. 100 for full Senate consideration at the earliest opportunity.

We would be pleased to serve the Committee by responding to any questions you may have. Thank you.

ECRI,
Plymouth Meeting, PA, March 13, 1985.

Hon. ROBERT W. KASTEN,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR SENATOR KASTEN: We would like to contribute to the very thoughtful public debate and examination of product liability issues you are conducting. You may find our views helpful and unique, insomuch as they spring from a nonprofit organization with a bona fide 15-year role in protecting the public from deficient medical divices. We are an independent testing organization which has stringent arms-length rules regarding industry. We operate an international reporting network for hazardous medical devices and have extensive experience in examining and resolving such problems not only from a medical and engineering viewpoint, but also in the area of litigation, product liability, and medical malpractice. Furthermore, our policy analysis group, engaged in technology assessment, planning, and value analysis, looks at longer range trends in this area.

As you know, medical malpractice and hospital liability may be the strongest growth industry in the United States today. The impact on physicians and hospitals is a matter of public record. What is not so well known, however are the consequences of medical product liability which are closely associated with physician malpractice and hospital liability.

The basic point we wish to make is that things have gotten out of balance. When malpractice, general hospital liability, or manufacturer's product liability costs (e.g., insurance, legal fees, internal costs) grow to the point where it is economically counterproductive or psychologically too oppressive, these suppliers of services and goods

simply leave the marketplace. This reduces competition, increases costs to the consumer and the nation, and weighs heavily against the board public interest.

Without respect to either the legal right or social desirability that individuals be compensated for injury, certainly an essential characteristic of this country for redressing legitimate grievances, there is often a conflict between such individual rights and broad public interests. The broad public interest is not simply the aggregate of such individual rights. When a supplier of essential services or goods simply quits because the disincentives outweigh possibilities of economic survival, the individual may have been compensated but the mass of people are more heavily "taxed" with rising prices, lack of availability of services and good, and fewer options for choice.

These are merely philosophical generalizations, however, which you and your committee have no doubt debated intensely. I would like, however, to give you a very specific case history to validate my points. This is not the only such case history, but it will serve to show the risks of imbalances in the product liability area.

The impact of product liability suits on U.S. manufacturers of anesthesia machines has been devastating.

The following American manufacturers of anesthesia units have stopped manufacturing complete units within the past few years: Foregger Div., Puritan-Bennett, Dupaco, Bird Corp., Ohio Medical—merged into Ohmeda, Harris Lake—merged into Fraser Harlake, Fraser Harlake—merged into Ohmeda, Chemetron, and McKesson—only dental units for about 10 years.

This has left only Ohmeda, owned by a British conglomerate, and North American Drager, a German company, in the field.

Of nine companies in business several years ago, four stopped producing anesthesia machines and three merged into a single firm, leaving two sources instead of nine as of early 1985. The last company has restricted sales to the dental field. The net effect is radically reduced competition and a fertile climate for the entry of foreign firms with its attendant impact on foreign trade. We are now importing rather than exporting anesthesia units.

No foreign manufacturers have had a significant part of the U.S. market—until now. Penlon (a British company) has been around for several years with a simple unit, which we evaluated; but now they are reported to have a high-tech unit ready to sell. Siemens-Elema, a German company, has been selling ventilators, which we evaluated; but now they are ready to push the anesthesia system version of their ventilator.

The real impact may come from a Japanese company, ACOMA, and a German company, American Anesthesia, Inc., which are ready to fill the gap with simple machines. But will they disappear from sight as soon as there is a significant accident?

While we stress that we have not addressed the issue of just compensation for injury or death, or whether or not foreign firms can and do produce superior devices, we do speak to the impact of product liability suits on U.S. companies, their product lines, and ultimately their customers.

Anesthesia machines are not especially complex, but their applications are. Human error related to clinical application, maintenance, and repair often complicate the issue of product liability and sometimes result in inappropriate action against manufacturers.

There needs to be a better balance drawn between a manufacturer's contribution to injury or death, and misuse, failure to heed instructions or warnings, and negligence on the part of users. This country did better when blame was rationally apportioned among the offending parties in a conflict, rather than imposing doctrines which made one party responsible no matter how much another contributed to a problem. Perfect safety in a product is an illusionary goal. While perfection should always be sought, irresponsibility should not be fostered. There must be a tight connection between action, fault, and consequences with some good intensive creative thinking. It should be possible to restore some semblance of balance which provides reasonable compensation to those relatively few victims of defective products without making it impossible for manufacturers to products for the welfare of the mass of Americans.

Thank you for permitting me to share this perspective with you.

Sincerely yours,

JOEL J. NOBEL, M.D.,
President.

AMERICAN CORPORATE COUNSEL ASSOCIATION,
Washington, DC, April 3, 1985.

Hon. ROBERT KASTEN,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR KASTEN: This letter is submitted on behalf of the American Corporate Counsel Association (ACCA) in support of S. 100, the federal product liability legislation. ACCA respectfully requests that this letter be made part of the Committee's hearing record.

The American Corporate Counsel Association is made up of attorneys who are members of the law departments of corporations, associations, and other private sector organizations, and who do not hold themselves out to the public for the practice of law. ACCA was established in 1982 and is the only national legal association that speaks for the corporate law department attorney. The Associaton has approximately 6000 members from all fifty states and several foreign countries. ACCA also has 21 local chapters around the country.

Positions of the Association on public policy issues are determined by the Board of Directors. It is the Association's policy to take positions on issues which affect the professional interests of corporate attorneys as members of the bar. The Association has adopted a resolution endorsing federal product liability legislation, such as S. 100, that would bring a measure of certainty and predictability which is currently not present in the product liability areas.

The Board debated at length the question of whether federal legislation was appropriate in an area of law traditionally reserved to the states. We believe, however, that it is an obligation of this country's legal system to provide at least some predictability to those who use it. Under the present system, a lawyer cannot advise the client on product liability questions with any degree of certainty. Further, it is unlikely that uniform state laws will be enacted to address the problem. For these reasons, ACCA has endorsed the concept of federal product libility legislation.

Product liability law has evolved from a blending of both contract and tort law concepts. It is primarily judge-made, with a number of states adding a statutory gloss on common law concepts.

Because of the way in which product liability law has developed, state law has become a crazy quilt of conflicting and contradictory theories. Even the most basic concepts vary from state to state.

The net result is a system in which the same product seller may or may not be found liable depending on the jurisdiction in which the case is brought or when the case is brought. The problems this situation imposes on a product manufacturer and counsel to that manufacturer are substantial. It is impossible for the counsel of a product manufacturer to set out for the client what the liability might be in any given situation.

ACCA members practice what is known as "preventive law." That is, their function is to prevent legal problems from arising in the first instance, rather than defend the client after an injury has occured. To effectively counsel the client on how that client can avoid liability, there must exist at least some minimum, generally applicable legal ground rules—rules which just do not exist under the current conflicting state of product liability law. Even though counsel can advise the client on what the law is in each state, counsel can give no guarantee that even the most basic notions of product liability law in a particular jurisdiction will not change by the stroke of a judge's pen.

Opponents of the federal legislation argue for resolution of the problem through enactment of product liability legislation in the various states. However, the various individual states cannot address the uncertainties presented by this area of the law. Products are manufactured, sold and used on a nationwide and international basis. Enactment of a product liability statute in one state does little to address the issue for those manufacturers in interstate commerce.

The record for this hearing and for hearings held in earlier Congresses on similar bills is replete with testimony setting out the confusing and conflicting status of state law in this area. The only real question this Committee has to answer is whether it is responsible public policy to continue this uncertainty. We submit that under the current state of the law, product manufacturers and sellers are significantly harmed, consumers as a class do not receive a significant benefit, and increased product safety is inhibited.

The costs of defending against frivolous suits and of researching the same issues under contradictory state statutes are substantial. These costs are, of course, borne ultimately by the consumer. Additionally, the system is producing a disincentive for manufacturers to update the safety features of their products. This is because, in

several jurisdictions, safety innovations made in a product after harm has occurred are admissible to prove liability. If a manufacturer is advised by counsel that safety innovations could result in adverse claims, the system is providing the manufacturer with a powerful reason to forego changes in product design.

The only group we can identify that benefits from the current situation are attorneys who receive legal fees for bringing and defending product liability suits. As past Committee reports have indicated, the legal costs paid out by the parties are higher than the amount recovered by the claimants. We do not understand how it can be argued the public is served by a system in which the transaction costs are as high as they are in the product liability tort litigation area. The system is grossly inefficient.

We are aware that other bar associations oppose enactment of S. 100. The majority of ACCA members are also members of the American Bar Association or the American Trial Lawyers Association. The Committee should be aware that there is a significant portion of the legal profession which does support federal product liability legislation in spite of the position of these other organizations.

As attorneys, we are very concerned that the other legal groups have not addressed the high transaction costs associated with product liability litigation. A system in which the lawyers are paid more than the claimants must serve to further erode public confidence in the legal profession.

ACCA believes that Congress has an obligation to both product manufacturers and to the public to enact legislation such as S. 100. ACCA stands ready to provide the Committee with any further information or assistance the Committee may wish.

Sincerely,

NANCY NORD,
Executive Director.

THE AMERICAN UNIVERSITY,
Washington, DC, April 30, 1985.

Hon. ERNEST HOLLINGS,
Senator, U.S. Senate, Committee on Commerce, Washington, DC.

DEAR SENATOR HOLLINGS: I am a professor of law and teach in the areas of Torts, Antitrust, and Administrative Law. Last year I was honored to have the opportunity to testify before the Commerce Committee on S. 44. I urged the Committee to reject S. 44 and filed a formal written statement supporting my point of view.

Many of the concerns reflected in my testimony and written statement apply to S. 100, the 1985 version of the product liability bill pending for so many years before the Congress. Like S. 44, S. 100 represents a major step backward in the field of consumer protection. It is a short-sighted, destructive and misleading legislative effort which will disrupt the product liability system, disadvantage consumers and interfere crudely with carefully evolved state policy preferences. It seems extremely unlikely that it will live up to its proponent's objectives: the reduction of transaction costs and the creation of a uniform system.

In every relevant section, the authors of the bill have elected language and policies which favor the interests of the insurance and manufacturing community, while disadvantaging those most in need of protection, the consumer. To think that a return to a convoluted negligence system will create uniformity seems ludicrous and deceptive. While I am not opposed fundamentally to any federal legislation, it is my view that S. 100 is the wrong bill, favoring the wrong interests and written with the wrong motivation.

If this bill becomes law, it will change in a profound manner the entire personal injury system. Because of the enormity of the change, I decided to survey a number of my colleagues within the academic community to determine their view of this proposed legislation. Not surprisingly, I found that many of the nation's top legal scholars are opposed to S. 100. As you can see from the list below, they come from many of the finest law schools in the country. On average, they have taught in the torts and product liability area for thirteen years. Many are tenured full professors.

Although there has never been a scientific sampling of opinion among law professors regarding S. 100, I believe that the enclosed list is indicative of the strong opposition to the bill among legal academics. For this reason, I am formally requesting that this information be placed in the hearing record of the Committee.

The following persons wrote to me expressing opposition to S. 100: Dean and Professor Guido Calabresi, Yale University Law School, Professor Lawrence C. Mann, Wayne State Law School, Professor Peter A. Donovan, Boston College Law School, Professor Allen Meisel, University of Pittsburgh, School of Law, Professor Robert G.

Vaughn, Acting Deputy Dean and Professor of Law, American University Law School, Professor Sheldon Nahmod, Chicago Kent College of Law, Professor Harvey L. Zuckman, Catholic University Law School, Professor Page Keeton, University of Texas School of Law, Professor Lewis D. Sargentich, Harvard Law School, Professor Alan Weisbard, Yeshiva University Law School, Professor James Stark, University of Connecticut Law School, and Professor Richard J. Abel, UCLA Law School.

Professor Elizabeth Reilly, University of Akron School of Law, Professor Teresa M. Schwartz, George Washington University National Law Center, Professor Ann C. Scales, University of New Mexico Law School, Professor Susannah M. Mead, University of Indiana Law School, Professor James Boyle, American University Washington College of Law, Professor Paul R. Joseph, Nova University Law Center, Professor Jerry J. Phillips, University of Tennessee Law School, Professor Marshall Shapo, Northwestern University Law School, Professor Sylvia Law, New York University Law School, Professor Howard Klemne, University of Colorado School of Law, and Professor Joseph A. Page, Georgetown University Law Center.

There were numerous comments written on the responses. It would be difficult to do justice to the comments without stating them in full. Essentially, the respondents views suggest comprehensive dissatisfaction with the legislation. If the committee has an interest in the text of these comments, I would be happy to provide them.

Sincerely yours,

ANDREW F. POPPER,
Professor of Law.

PROPERTY-CASUALTY INSURANCE MARKET OPERATION*

INSURANCE MARKET OPERATION

Insurance rates for property-casualty coverages—of which products liability is an important line of business—are currently rising dramatically. This is particularly the case with commercial or business-related, rather than individual, lines of insurance. Central to an understanding of this market phenomenon is some perspective on or appreciation of the structure and organization of the insurance industry and particularly the market fluctuations that have historically characterized the operation of the property-casualty segment of the insurance business. In addition to an analytical overview of property-casualty insurance industry market cycles and a summary of recent industry performance, this report first provides background information and analysis on risk and insurance, insurance regulation, and insurance industry structure.

RISK AND INSURANCE

The concept of "risk", as it relates to insurance, concerns the uncertainty or chance of losing something of worth or value. Insurance is probably the most practical and widely used method for contending with the magnitude and variety of risks that confront individuals, businesses, and society as a whole.

The fundamental principle of insurance is the spreading of risks. Insurance is a means on containing the losses of some few by spreading the cost of losses among many. The idea of transferring the risk of loss from the individual to a group is an ancient concept. Small contributions from participants have long been pooled in a common fund to accommodate the anticipated losses that only some of the group members will experience. The historical development of insurance has led to the transfer of control of the common fund from the contributors themselves to insurance corporations and their managers.

A debate continues between insurers and critics of the industry concerning whether or not the current insurance process actually involves a transfer of risk from the insurance customers to the insurance companies. Insurers say that the risks are transferred to the companies, rather than that their customers spread the risks. The point of contention concerns whether the insurance companies, themselves, actually bear the risks they insure and whether or not they, therefore, are entitled to profits commensurate with the risks transferred, as they measure those risks.

Industry critics contend that no risk is actually transferred from the consumer because the policyholder contributions are pooled in a common fund and risks are thus accommodated through the redistribution of the common fund to those few who sustain a casualty.

Insurers say that the complex contemporary economic system requires them to operate as corporations and to perform a capital formation function similar to banks. They contend that business enterprise benefits not only from the "transfer"

*By David Whiteman, Economic Analyst, Economics Division, Congressional Research Service.

of potentially debilitating risks but also from obtaining capital funds from insurers. Insurers also contend that individuals benefit from the availability of a wide variety of insurance products and services, and the economy as a whole benefits from the many jobs that the industry creates.

INSURANCE REGULATION

The insurance industry is the only large-scale financial service sector not directly regulated at the Federal level of government. Insurance regulation has been by statute and long precedent a State, rather than a Federal, concern. Legislation to provide for Federal supervision of the insurance industry was first proposed in the 1860s. In *Paul* v. *Virginia* (1869), the Supreme Court ruled that insurance was not interstate commerce and therefore not subject to Federal regulation. In 1944, the Supreme Court reversed its earlier decision by ruling in *U.S.* v. *South-Eastern Underwriters Association* that insurers were subject to Federal antitrust laws. The Congress responded in 1945 by enacting the McCarran-Ferguson Act (15 U.S.C. §§ 1011–15 (1970)). The Act exempted the "business of insurance" from Federal antitrust laws to the extent that States provide similar antitrust supervision. In effect, the Act reaffirmed the traditional principle of State supervision and regulation of insurance and exempted the insurance industry from those sections of the antitrust laws that prohibit price-fixing. In the years since its enactment, the McCarran-Ferguson Act has been the target of persistent criticism.

The United States is atypical among nations in not supervising its insurance industry at the national level. The U.S. system of insurance regulation may puzzle foreign observers. Europeans are accustomed to consider the free movement of trade and commercial services as one of the prime responsibilities of a central government and the existence of uniform legal rules for large-scale business operations as an essential condition for that free movement.

The U.S. system of insurance regulation evolved from a legacy of early State regulatory activities and, either as cause or effect, insurance development and thinking has been primarily geared to a State-by-State approach. The quality of State insurance regulation has, however, been characterized as uneven, and the coordination of interstate regulatory activities can present serious problems. The multiplicity of State insurance codes have the distinct disadvantage of lacking uniformity. Critics of State regulation emphasize the duplication, complexity, and inefficiency that may result from nonuniformity. From its simple beginnings, State insurance regulation has developed into a complex institution with strong vested interests. Insurers have, by and large, learned to live with the existing system and have shown distaste for change in regulatory patterns.

The McCarran-Ferguson Act has been interpreted to provide for a continuing congressional oversight function, and, in recent years, the Congress has demonstrated increased interest in exercising this responsibility. Consumer/constituent complaints related to the operation of insurance markets and concerning problems of availability and affordability of certain insurance coverages coupled with congressional concern regarding the adequacy and effectiveness of State regulation have in recent years prompted examinations of a broad range of insurance industry practices and activities. Senate Judiciary subcommittees have conducted investigations (1958–60 and 1967–73) on how well the States are overseeing the business of insurance. Opponents of Federal initiatives concerning insurance have defended the industry's record of performance and consequently oppose any change in the current system of regulation. This includes opposition to increased Federal oversight as well as any Federal regulatory role.

In 1979, President Carter's National Commission for the Review of Antitrust Laws and Procedures concluded that the McCarran-Ferguson Act should be repealed and replaced with a law limiting collective activities among insurers. The Commission also recommended a comprehensive study of the economic regulation of the insurance industry. In hearings before the Commission, the Federal Trade Commission suggested that "the federal antitrust laws should be fully applied to the insurance industry, with specific, narrowly drawn exemptions for particularly necessary or highly desirable activities." The Justice Department has also taken the position that an antitrust immunity is not necessary for the survival of a healthy insurance industry, and that insurance company freedom to set rates would result in consumer savings without undue risk of company failure.

In October 1979, the General Accounting Office issued a report, "Issues and Needed Improvements in State Regulation of the Insurance Business," which was critical of State handling of consumer education, classification and rating review,

and consumer complaints. The Senate Judiciary Subcommittee on Antitrust, Monopoly and Business Rights held hearings on the report shortly after it was released.

In 1984, during the last session of the 98th Congress, the House Judiciary Committee conducted a series of hearings based broadly upon the findings of the National Commission for the Review of Antitrust Laws and Procedures, as reported in 1979. Although no legislative initiative that would modify the McCarran-Ferguson Act was then proposed as a result of the hearings, observers do not rule out the possibility of such a proposal in the current Congress.

Congressional interest in the efficacy of State insurance regulation has set in motion considerable legislative activity in insurance-related matters resulting in extensive hearings and various legislative initiatives. While this activity has prompted some changes in the conduct of the insurance industry and has encouraged States to exercise more conscientious regulation, it has not caused any fundamental changes to occur in the structure of insurance regulation in the United States.

INSURANCE INDUSTRY STRUCTURE

The business of insurance has traditionally been divided into two major segments. One is comprised of companies writing life, health, disability, and annuity insurance. This side of the business is usually referred to as "life and health." The other side, known as "property and liability" or "property and casualty," writes such lines as auto, homeowner's, worker's compensation, marine insurance, and fidelity and surety, in addition to a great diversity of commericial property and liability (casualty) coverages. The two segments of the business remain largely separate in corporate structure, in regulatory treatment, and in many phases of operation (although the separation has narrowed considerably during the last quarter of a century).

Most of the large insurance corporations are now diverse groups comprised of legally separate, affiliated/subsidiary companies, generally under the same management. Most corporate "fleets" or groups are comprised of companies that write either life-health or property-liability type of coverages. These traditional distinctions, however, are breaking down, and some companies are now organized on a "multiline" basis that allows them to write both broad types of insurance coverages.

During a period beginning in the late 1960s, and continuing throughout much of the 1970s, significant changes occurred in the traditional corporate organization structures of insurance companies. These changes resulted in broad-based company diversification. For the most part, insurers have sought product diversification through business combinations. Their motivations have included: a desire for more vigorous growth; a reduction of profit fluctuations; more freedom in external financing; and the necessity to position themselves for anticipated changes in the financial marketplace.

A number of insurance companies became, through the conglomerate merger and acquisition process, part of business combinations marketing noninsurance services and products. "Stock" insurance companies [1] were acquired by corporations whose primary enterprise was not insurance. Even more prevalent was the formation of insurance company holding companies. Typically, a holding company was formed by the owners of an insurance company organized on a stock basis with the stock of the insurer being exchanged for the newly issued stock of the holding company. The holding company then acquired or established subsidiaries in fields that insurers have traditionally been forbidden to enter.

These methods of diversification are not available to insurers organized on a mutual basis. Under many State laws, it is possible, but rather difficult, to convert from a mutual mode of operation to that of a stock insurer.[2]

Insurers that formed holding companies could and did shift significant portions of their capital to their holding companies for investment outside the insurance industry. Unprofitable stock insurers also have been purchased by large conglomerate companies for the purpose of acquiring the assets of the insurer to be employed in their non-insurance operations. This drain of existing capital has had the effect of indirectly reducing future insuring capacity. These inroads on the capital of the industry have been of concern to State insurance regulators.

In order to correct the competitive disadvantage of the mutuals and to discourage the use of insurance company holding companies, many States have modified their

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[1] A company organized and owned by its stockholders as distinguished from the mutual form of company which is owned by its plolicyholders.

[2] This "demutualization" process has recently attracted considerable attention from insurers because of tax considerations enacted as title II of the Deficit Reduction Act of 1984 (P.L. 98-369).

insurance codes. In the main, the modifications relaxed the laws that limit the proportion of insurer assets that can, in the aggregate, be invested in common stock or in the common stock of one company. These new law generally allow insurers to own controlling interests in subsidiaries engaged in closely related or ancillary activities. Such activities include other forms of insurance, mutual fund investment management, mutual fund broker-dealerships, banks, savings and loan associations, personal finance companies, computer services, computer leasing, and real estate development. Insurers are permitted, under the new laws, to expand their subsidiary operations to include a broad range of financial services and closely-related services, but are not permitted to enter unrelated field. The scope of insurer-holding companies are not similarly limited. Most such companies, however, have chosen to concentrate on financial services.

Another broad insurance industry distinction concerns the types of coverages (lines of business) that insurers offer. This distinction contrasts "personal lines" coverage for the individual or family as opposed to insurance coverages for businesses. Personal line include life and helth coverages and such property lines as automobile and homeowner insurance. Commercial lines encompass a very large range of property and liability types of coverages that are purchased by business entities. State regulatory authorities have traditionally been more concerned with the protection of the individual insurance purchaser that with protecting corporate insurance buyers. The prevailing regulatory theory has been that corporations have sophisticated insurance purchasers (risk managers) who can deal in the marketplace on an equal footing with the sellers of insurance products. The individual insurance purchaser lacks the market knowledge and economic leverage of the corporate risk manager and thus the individual's interests warrant primary regulatory attention.

PROPERTY CASUALTY INDUSTRY MARKET CYCLES AND RECENT INDUSTRY PERFORMANCE

The property-casualty sector of the insurance business has in the United States for much of its modern history, alternated between "soft" and "hard" (or "tight") insurance markets. These market fluctuation of varying degrees of intensity and duration, have come to be referred to in insurance circles as the "underwriting cycle." When rates are adequate, risk selection careful, and the industry in generally performing well (profitably), new capital is attracted and begins to enter the marketplace. This new capital can come from a number of sources. "Capacity" can increase when insurers decide that they can commit more of their assets to underwriting profitable lines of business. New insurers, such as off-shore captive insurers, foreign insurers, and domestic insurers who generally write other lines of business, begin to enter the market. These new sources of insurance capacity begin to generate increased competition for available premium volume, and price cutting (discounting) begins. Discounting can be particularly intense for commercial lines of insurance because corporate insurance buyers are sophisticated and can use their market knowledge and economic leverage effectively. Increased competition also means that underwriting standards for risk selection diminish and insurers, in their desire to maintain market shares, begin to take on less-than-standard business also at discounted rates. Looser underwriting practices and inadequate rates, over time, inevitably result in rising claims losses and possible loss of profitability.

When competition is too severe and losses too high, the market begins to harden. Capacity shrinks, and some insurers withdraw from the market. The remaining insurers raise prices and tighten underwriting standards. When an insurance market hardens and capacity shrinks, prices rise and selectivity tightens. Problems, sometimes very severe problems, of availability and affordability of necessary insurance coverage results. Insurance markets usually stabilize and eventually profitability returns. With the return of profitability new capital is attracted. Then the ensuing competition among insurers for a share of the available premium volume eventually leads to another soft market.

Traditionally, the measure of economic health and performance of an insurance operation is the "combined ratio." This ratio relates claim losses and underwriting expenditures to premium income. A combined ratio of 100 means the operation is breakeven, below 100 means an underwriting profit, and above 100 indicates a loss.

Property-casualty insurance companies generally pay out more for claims and expense than they receive in premiums; this is known as an underwriting loss.[3] The

[3] Life insurers can predict with much greater precision than property-casualty insurers what their loss experience will be and, as an industry, their underwriting results are more favorable.

property-casualty segment of the insurance industry has lost money on underwriting every year since 1978. In 1983, for example, the combined ratio was 114.

Despite underwriting losses, however, most companies have been able to show an overall profit for most years because profits that come from investing premium dollars more than offset underwriting losses. The high interest rates of recent years helped insurers to have high investment incomes. To a large extent, many companies have come to rely upon this income, rather than on positive underwriting results, for favorable yearend performance. This strategy has been dubbed "cash-flow underwriting," and the concept has been criticized by some financial experts and State regulators. During the past six years, the property-casualty insurance market was characterized by many insurance companies practicing "cash-flow underwriting", discounting premiums in an attempt to gain market share and to generate premium dollars to be invested at the then prevailing high interest rates. Falling interest rates have now begun to force insurers to increase premium rates and to be more selective in their underwriting, heralding a return of sound underwriting standards, at least for the short term.

Continual expansions and contractions of market capacity (the total amount of coverage that insurance underwriters are willing to commit to a specific line or class of business at any one time) are characteristic of the normal operation of the property-casualty insurance business.

Insurance companies are not philanthropic institutions. The private market will operate to provide specific types of insurance coverage only if insurers can underwrite risk exposures profitably (bearing in mind that overall profitability includes the consideration of investment income combined with uderwriting results).

When interest rates rose dramatically during the late 1970's and early 1980's, so too did the desire on the part of insurers to bring in new premium dollars that could be invested at very high rates of return. In the rush to be competitive, many insurers underwrote business at greatly discounted prices. In the scramble for market share, insurers were afraid other underwriters would take their book of business if they did not discount prices also. Industry observers have characterized some of the recent major wounds suffered by the property-casualty industry as "self-inflicted", as many insurers failed to heed their own warnings against "cash-flow underwriting". In the scramble for new premium dollars and market share, many insurers are reported to have thrown underwriting caution to the wind.

During the six-year soft market cycle, some companies engaged in heavier rate discounting than others. Consequently, the recent poor financial results and other painful effects of "cash-flow underwriting" have impacted upon insurers in varying degrees. The recent financial performance of the property-casualty industry has been particularly poor. Insurance industry analysts have characterized this performance as the longest and most severe down cycle in the history of the industry. Insurance industry analysts say the excessive price cutting that forced insurers to absorb underwriting losses (since 1978) has prevailed for too long and penetrated too deeply for prices to return to a profitable level in a short period.

The Insurance Service Office [ISO] [4] has forecast that the property-casualty industry combined ratio results for 1984, for all lines, will come in at 118 and will diminish marginally, to 117 in 1985. They estimate the combined ratio for all commercial lines will be 127 in 1984 and will drop slightly to 125 in 1985. The forecast combined ratio for personal lines is 108 in 1984 and ISO predicts that it will remain at that level in 1985.

Industry underwriting losses were approximately $21 billion in 1984, representing an increase of about 58 percent over the $13.3 billion in losses recorded in 1983. Combined losses for this two-year period were more than the total underwriting deficit for the 25 years from 1958 through 1982.

Underwriting losses were so great that investment income, which reached a record high in 1984, was not able to offset the red ink on the underwriting side. Investment income for the property-casualty industry was $17.3 billion in 1984, an 8.1 percent increase over 1983 results.

Through 1983, investment income, fueled by the high interest rates of recent years, was sufficient to offset underwriting losses. In 1984 underwriting losses surpassed investment income for the first time, and by a considerable margin.

When the final figures for 1984 are tallied, pre-tax operating losses for the property-casualty industry are estimated to come in at between $3.55 and $3.7 billion

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[4] ISO is an insurance service corporation that provides a wide range of advisory, rating, statistical and other services relating to property-casualty insurance to insurers, insurance organizations, and other customers.

making 1984 the worst year ever for the nation's property-casualty insurance industry.

Representatives of the property-casualty insurance industry have for sometime forecast and are now actively engaged in promoting, the ending of the soft property-casualty insurance market that has prevailed since 1978. Prices throughout the industry for major commercial coverages are now increasing dramatically. Quoted terms and conditions of coverage are becoming much more stringent, and insurers are being much more selective in their underwriting judgments.

There is significant concern within the property-casualty insurance industry that as the market swings into a hard cycle that there may not be adequate available underwriting talent in the industry to properly price business. Industry analysts and observers agree that underwriters will be critically important to property-casualty insurers in the changing insurance marketplace because in a hard market situation risks must be properly priced if insurers are to regain profitability. An underwriter is an experienced insurance professional who evaluates each risk and makes a determination of the proper premium price to afix to each risk exposure. Underwriters will have to take a harder line (be more selective and increase rates) but they cannot be too hard if the insurers are to recover financially. The charge has been made that less experienced underwriters have not worked in a "normal market" and that they do not know how to price business accurately because they never have had to do it. All they needed to know in a soft market was what rates their competitor's underwriters were quoting.

The property-casualty business is in a stage of transition that many industry analysts consider long overdue. The return to sound underwriting standards and practices has been widely applauded, however, there is also some concern that the market may harden too intensely and precipitate a capacity/availability crisis. For certain lines of business where losses in recent years have been particularly severe, for example, aviation products liability insurance, professional liability insurance, and over the road trucking, to name a few; quoted insurance rates in recent months have seen truely alarming increases.

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,
Juneau, March 20, 1985.

Hon. ERNEST F. HOLLINGS,
U.S. Senate,
Washington, DC.

DEAR SENATOR HOLLINGS: This letter is to advise you of my strong opposition to S. 100, the Product Liability Act.

This legislation would mark a drastic change in the present law of product liability. The net result of S. 100, would be to shift the costs for defective products from the manufacturer to injured consumers and workers. Last year, Senator Hollings described a similar bill as "one of the worst bills" the Senator Commerce Committee had reported during his 18 years in the Senate. S.100 does not include the punitive damages provision in S.44, which was considered in the 98th Congress, but there remain too many problems with S.100 to justify its enactment. The bill has been opposed in the past by an impressive array of public interest groups—all major consumer interest groups, labor unions, the National Governors' Association, the Conference of Chief Justices, the National Confernce of State Legislatures, the National Association of Attorneys General, and the American Bar Association. The supporters of the bill include the Product Liability Alliance (a coalition of manufacturers and insurers) and other special interest groups, such as the Sporting Arms & Ammunition Manufacturers' Institute.

It is difficult to imagine federal legislation which is in such direct opposition to the interests of most Alaskans. The problems with S.100 for Alaskans include these:

Injured persons will not only have to prove that the product was defective, but also that the manufacturer was negligent in design.

Injured persons will have to prove that the manufacturer negligently failed to warn about dangers that could result from the ordinary use of the product.

Manufacturers will no longer have the duty to make their products safe for many reasonably foreseeable uses.

Manufacturers will now be able to avoid liability on the grounds that the danger in a defective product was obvious.

The Alaska Supreme Court in 1969 (*Clary* v. *Fifth Avenue Chrysler Center, Inc.*, 454 P2d 244) adopted the doctrine of strict liability in tort in product liability cases. This is a doctrine which is important to Alaskans because of their uncommon reli-

ance on many manufactured products in a hostile environment. Product failure in most parts of the United States may only result in consumer inconvenience, whereas in Alaska this can result in serious injury or death. For example, the user of a defective pharmaceutical product in Alaska may be hundreds of miles from a hospital. The same would be true in cases involving defective snowmachines, airplanes, boats, firearms, and many other products.

I hope that you will agree that this is a case where Alaskans should be left alone by the federal government to decide the legal responsibility of businesses which market their product in Alaska. In my opinion, maintenance of the traditional approach to product liability is in keeping with a proper balance of authority between the federal government and the fifty states.

Please include this letter in the Subcommittee's hearing record on S.100.

Sincerely,

BILL SHEFFIELD,
Governor.

THE EFFECT OF FEDERAL PRODUCTS LIABILITY LEGISLATION ON LEGAL FEES*

The term "products liability" refers to the liability of a manufacturer or seller for injuries to the person or property of a buyer or third party that are caused by a defect that existed in a product at the time it was sold by the defendant. Products liability today is almost entirely a matter of state law (primarily case law in most states), and there are variations in the state laws on the subject.

In the last several Congresses various bills have been introduced to create a federal cause of action for products liabilty that would preempt state products liability suits.[1] These bills generally have been supported by manufacturing interests and opposed by consumer representatives. Supporters of the bills see the potential benefits of federal products liability legislation as, among other things (1) creating national uniformity, (2) eliminating recoveries they view as unwarranted or excessive, and (3) reducing legal costs. This report will discuss the third issue, although the other two are related and will also be mentioned.

House Report No. 97-670, 97th Congress, 2d Session (1982),[2] discussed the lack of national uniformity among products liability laws:

"Because products liability rules are developed almost exclusively by judges in State courts, the rules may vary from State to State and even within one State. . . . All of this creates great uncertainty as to the applicable legal rules. Decisions on virtually every aspect of product liability law illustrate great variations among the States and constant changes in legal rules within a State. . . . Manufacturers who do business on an interestate basis in a national marketplace are unable to predict which of the multiple legal standards will apply to them or whether a particular standard will remain constant" [pp. 4, 5].

This uncertainty the report cited as a cause of high legal fees:

"Uncertainty about the law of product liability increases the costs of litigating a claim. Time and effort must be expended by all parties to determine what the applicable legal rules are. Further, the possibility that a court may adopt a new legal standard in a given case gives the parties the incentive to argue for adoption of a new standard that would aid their case. . . . Because the law is unclear and because, even if it is clear, may change, parties have great difficulty evaluating the merits of their case. As a result, it is difficult to come to a rational settlement decision. Parties therefore incur the costs of litigating claims which could have been settled to the satisfaction of all involved" [p. 7].

The report cited sme statistics concerning legal costs:

"According to calculations derived from a 1977 survey conductd by the Insurance Service Office, for every dollar paid to claimants, insurers paid and average of 42 cents in defense costs. And for every dollar awarded to a claimant, he or she pays an average contingent fee of 33 cents in legal costs and therefore receives about 67 cents. Thus, one can estimate (adding the average defense cost to the contingent fee)

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* Henry Cohen Legislative Attorney American Law Division, CRS.

[1] Pending in the 98th Congress are H.R. 2729 and S. 44, which was reported March 27, 1984 by the Senate Committee on Commerce, Science, and Transportation. In the 97th Congress, the same committee reported S. 2631, an earlier version of S. 44. For purposes of this report, the differences in these bills are immaterial.

[2] House Report No. 97-670 accompanied S. 2631, 97th Congress; see note 1, *Supra.*

that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant" [p. 7].[3]

Another study reported that, of the total compensation paid by defendants and insurers in asbestos products liability legislation from the early 1970s through March, 1983, "41 percent was used by plaintiffs for their legal fees and other litigation expenses."[4]

The degree to which federal products liability legislation would affect these legal costs is of course extremely specualtive. However, to the extent that these costs are inflated by the lack of national uniformity in products liability laws, it seems questionable whether they would be substantially reduced by enactment of federal products liability legislation, at least in the form it is presently being considered. This is because it seems arguable whether the pending bills would significantly increase the national uniformity of products liability law. Although they would create a single statute to govern most aspects of products liability law, such statute could be applied and interpreted by more than 50 jurisdictions (the states, territories, and possessions of the United States), subject only to review by the United States Supreme Court.

The reason the bills could be applied and interpreted by more than 50 jurisdictions is that they would not allow suits to be brought in federal court unless there was diversity jurisdiction, which exists generally when the plaintiff and defendant reside in different states and the amount controversy exceeds $10,000 28 U.S.C. § 1332. Diversity jurisdiction ordinarily applies only to suits arising under state law, because suits arising under federal law generally may be brought in federal court simply because they arise under federal law. 28 U.S.C. § 1331. In suits arising under state law that are brought in federal court on the basis of diversity jurisdiction, federal courts must follow stae court interpretations of state law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1937).

Under the pending products liability bills, diversity cases would arise under federal law, so federal courts apparently would not be bound by state court interpretations. Consequently, it would take a Supreme Court decision to reconcile varying interpretations. Even if the bills were amended to allow federal jurisdiction in all cases, varying federal district court interpretations might be reconciled differently by the twelve federal circuits before the Supreme Court settled the issue (if it chose to do so).

The possibility of many different interpretations seems likely to reduce significantly the prospect of uniformity because many provisions of the pending bills appear susceptible to differing interpretations. Even if, after litigation, various jurisdictions ultimately agreed on the meaning of a particular provision, there still would have been legal fees expended in the litigation. Furthermore, even if various jurisdictions interpreted a particular provision to mean the same thing, their application of it might differ. This perhaps would be unavoidable with any codification of tort law, since tort law depends so heavily on open-ended concepts such as reasonableness, foreseeability, and negligence. Thus, even if two jurisdictions agreed as to the meaning of the phrase "practical technological feasibility" (which is used in § 5(b)(2)(A) of S. 44), they might differ as to whether a particular design change was within practical technological feasibility.

The type of legislation that would be more likely to reduce legal fees significantly is no-fault legislation, such as workers' compensation or no-fault automobile insurance. Under these statutory schemes, injured parties recover fixed sums without having to prove fault, so that a significant burden, for which legal representation is usually needed, is removed. To recover today in a products liability action, however, falut must be proved; this is true even in strict liability cases, in which negligence need not be proved, but the fact that the defendant was responsible for an injury-causing defect must be.[5] Since the pending bills would not remove this element of proof, it can be argued that they would be unlikely to reduce significantly the amount of products liability litigation.

In one respect it appears that the bills would reduce the amount of products liability litigation. In order to eliminate recoveries that manufacturers view as unwarranted or excessive, the bills would preclude some recoveries that might be available under state law. For example, the bills' statutes of repose, which would prohibit actions brought a specified period of time after the first sale of a product,

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[3] The survey cited was Insurance Service Office, *Product Liability Closed Claim Survey, A Technical Analysis of the Survey Results*, New York, 1977, at 11.

[4] Institute for Civil Justice (Rand Corporation), "Costs of Asbestos Litigation," Santa Monica, 1983, at v.

[5] *But cf., Beshada* v. *John-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

would preclude some actions from being filed at all. For another example, S. 44 would allow only the first plaintiff that sues in connection with a particular product defect to recover punitive damages; lawyers for subsequent plaintiffs therefore would not spend time preparing punitive damages claims. To this extent, of course, the bills would reduce legal fees. However, for the most part, although the bills in some respects would make recovery more difficult, they would not appear likely to eliminate litigation. Rather, they would merely change the issues to be litigated.

In conclusion, to the extent that the lack of uniformity among state products liability laws increases litigation costs, a federal products liability bill might reduce such costs. On the other hand, it can be argued that the pending federal products liability legislation would not significantly increase national uniformity or significantly reduce the number of products liability suits. Consequently, it appears questionable whether the pending bills would have a substantial effect on legal fees.

STATEMENT OF ARLENE VIOLET, ATTORNEY GENERAL, STATE OF RHODE ISLAND, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

On behalf of the National Association of Attorneys General, we voice our opposition to the Product Liability Act (S. 100). This piece of legislation raises such serious problems that it is difficult to enumerate all of them.

S-100's preemption of state law would be an entirely unprecedented solution to the alleged problem of conflicting state product liability laws. The proposed legislation is a far broader preemption of state tort laws. The proposed legislation is a far broader preemption of state tort law than any previous federal law. Formerly, the off-cited preemption of state law was only for compensation of extremely narrow categories of injured parties, e.g., the Federal Employers Liability Act (railroad workers) and the Longshoremen's and Harbor Workers' Compensation Act (maritime employees), or for a most uncommon type of accident, e.g., the Price-Andersen Act (nuclear power plant accidents). S-100, however, would supersede state standards for compensation of all victims of any type of product-related injury.

S–100 also raises serious questions about the proper manner in which to allocate jurisdictional responsibilities for federal statutes. While it supplants state standards on the one hand, it places on the state's shoulders the sole responsibility to administer federal law and interpret its new legal standards. In light of same, rather than bring uniformity to the product liability litigation system, S–100 would create just the opposite by forcing state courts to interpret many legal terms and principles with which they have no experience or familiarity. Inevitably, the bill would result in different and conflicting state court interpretations of the new standards.

The advocates of this legislation indicate that it is justified because it reduces insurance costs. First of all, there is no product liability insurance crisis as S–100 proponents claim. Even at the so-called height of the insurance crisis in the mid-70's, product liability insurance costs never exceeded 1% of gross sales in the vast majority of industries. In addition, as the Legal Study of the Interagency Task Force on Product Liability concluded, state tort rules have no direct or significant impact on insurance costs. The real causes of any problems in the product liability insurance system are (a) the subjective ratemaking practices of the insurance companies and (b) the failure to take insurance companies' investment income from loss reserves into account in the rate-setting process. Any alleged product liability insurance problems can be better addressed by giving the recently-enacted Risk Retention Act of 1981 a chance to work.

Proponents also argue that S–100 could be justified because of so-called economic bills which manufacturers attribute to state product liability laws. The manufacturers are just plainly wrong. Less than 1% of the 9 million to 30 million annual product-related injuries ever result in product liability claims. The most comprehensive analysis on the product liability system to date has been done by the Interagency Task Force on Product Liability. There is absolutely no substantiation to the allegation that product liability lawsuits have both increased liability insurance costs and have deterred development of worthwhile new products.

In light of the above, the Commerce Committee should not permit the elimination of strict liability for design defects or for failure to warn. There should be no elimination of strict liability for the non-manufacturer sellers, e.g., wholesalers, retailers, distributors, in construction defect cases, unless the manufacturer cannot be reached. The Act, as it presently stands, severely undercuts joint and several liability and reduces recovery in third party suits by injured workers. As a result of this proposed act, the court may disallow recovery for an injured worker from a product manufacturer if the evidence shows that the employer's negligence was an overrid-

ing cause of the worker's injury. The National Association of Attorneys General believes that dismissal of a claim for damages by an injured worker against a product manufacturer is an unjust result where the injured worker did not contribute to his own harm.

Finally, the instant bill proposes an unjustified usurpation of the 50 states' authority to regulate the rights, responsibilities, health and safety of their citizens. The principle of federalism requires that the states maintain their traditional responsibility to create and enforce tort laws to protect their citizens against injuries and compensate victims injured by defective products. For the last 150 years, the states have developed effective product liability laws which balance the interest of manufacturers and product users and places the cost of injury on the party best able to prevent injuries or bear the cost of compensation. This bill, in effect, destroys that body of product liability law that states have carefully developed.

The National Association of Attorneys General, therefore, objects to the passage of this legislation.

STATEMENT OF TERRY WESTHAFER, PRESIDENT, AMERICAN RETREADERS' ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to submit testimony in support of S. 100, legislation to regulate interstate commerce by providing for a uniform product liability law. ARA contends that such legislation is long overdue.

My name is Terry Westhafer and I serve as President of the American Retreaders' Association ["ARA"]. ARA is a national nonprofit trade association representing approximately 1,600 members nationwide who are engaged in the retreading of tires, the sale of tires, the reparing of tires, and the sale of related products and services.

Product liability law, in essence an outgrowth of the old common law concept of torts or wrongful damage, has become a morass. It has evolved into basically a system of no-fault insurance imposed by the courts upon the industry. While lawsuits are ordinarily directed against manufacturers (and some retreaders are defined as manufacturers), it is not unusual for wholesalers, distributors and retailers to be named as defendants.

As Senator Kasten contends, no area of civil law today is more confusing, more costly, or more counterproductive than product liability law. There exists no reasonable uniform national law. Whether it be an injured consumer, or a manufacturer, or a retailer, product liability law is a legal quagmire of 50 different jurisdictions with conflicting and ever-changing rules.

Certainly anyone wrongfully damaged should have access to the courts. But broad concepts of liability "externalize" the cost of negligence. If someone foolishly abuses a product, for example, why should fellow consumers subsidize his actions? The questions should be what is unreasonable abuse and what is foreseeable. S. 100 would "internalize" the cost of torts with stricter limits on liability, which would arise only from unreasonably dangerous construction and design or from a failure to warn of danger or from a failure to live up to an expressed warranty.

Product liability has unfortunately expanded the litigiousness of American society and has caused some to raise serious concerns of legal ethics. Complex laws and precedents spur lengthy litigation which in many cases leads to exorbitant costs. Studies presented to the Commerce Committee during prior hearings indicated for that every 66 cents consumers attain in liability judgments, lawyers make 77 cents in legal fees.

Consumers ultimately pay the fare for these confusing product liability laws when the ever-increasing liability insurance rates are passed on in the form of higher retail prices. ARA does sponsor a national product liability insurance program for its members. Rates are high because they are set on a national basis and respond to all vagaries and extremes in product liability case law. A single costly court decision could raise insurance rates nationwide. Such situations could become serious burdens on interstate commerce.

S. 100 also considers provisions regarding the effect of compliance with government standards on the liability of manufacturers or product sellers from harm caused by a product. A product in compliance with existing standards could be found unreasonably dangerous only if the claimant could produce clear and convincing evidence that the produce was unreasonably unsafe and that a safer design was technologically feasible and would have complied with all mandatory safety standards.

The product liability reform issue crosses traditional party iines. The Carter administration supported the concept of a federal stature; and the Reagan administration followed suit by endorsing S. 44 in the 98th Congress.

Mr. Chairman, product liability is a growing problem of major concern. A fair and reasonable law will promote public safety, will reduce consumer costs, and will help unclog the courts. ARA urges prompt and positive consideration of S. 100.